

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ALRA G. FARRELL, SUBSTITUTED FOR
BELDON M. DELANY,
Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A
CORPORATION, AND NORTHERN PA-
CIFIC RAILWAY COMPANY, A CORPORA-
TION,
Appellees.

Transcript of the Record

*Upon appeal from the United States District Court
for the District of Idaho, Northern Division.*

FILED
DEC 30 1918

No.....

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

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In the District Court of the United States for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR
BELDON M. DELANEY,
Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A
CORPORATION, AND NORTHERN PA-
CIFIC RAILWAY COMPANY, A CORPORA-
TION,
Defendants.

No. 660.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled action, that Alra G. Farrell, plaintiff herein, may serve and file herein, unless objection thereto is made by the Court, her amended complaint hereto attached, which amended complaint shall supersede the original complaint herein for all purposes of this action.

Dated this 16th day of October, 1917.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.

STILES W. BURR,
SKUSE & MORRILL,
Attorneys for Edward
Rutledge Timber Com-
pany, Defendant.

CANNON & FERRIS,
Attorneys for Defend-
ant Northern Pacific
Railway Company.

Approved,
Dietrich, Judge.
Oct. 31, 1917.

(Title of Court and Cause.)

No. 660.

AMENDED COMPLAINT.

Plaintiff complains of the defendants and alleges:

I.

That the defendant Edward Rutledge Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, Washington, and is a citizen of the State of Washington.

II.

That at all times herein mentioned the Northern Pacific Railway Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin.

III.

That at all times herein mentioned Beldon M. Delany was and until the time of his death a citizen of the United States, over the age of twenty-one years, and a citizen and resident of the State of Idaho, residing upon the land hereinafter described, in Sho-

shone County, Idaho, and at all of said times was duly qualified to enter and acquire title to one hundred and sixty acres of land, more or less, under the homestead laws of the United States.

IV.

That on or about the 1st day of April, 1901, one W. B. Leach located and settled upon the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty (20), Township Forty-three (43), North, Range Four (4) E. B. M., then unsurveyed public lands of the United States, situated in the County of Shoshone, and State of Idaho, and within the Coeur d'Alene Land District, with the intention of then establishing and continuously thereafter maintaining his home thereon, and with the intention of entering same under the homestead laws of the United States when the said land should have been duly surveyed and open to entry under said laws, and thereafter continuously resided upon said land, cultivated and improved the same to and until the 21st day of June, 1903; that on or about the 21st day of June, 1903, Beldon M. Delany herein having purchased and secured the possessory right and right of possession of the said W. B. Leach in and to the land and premises hereinbefore described, located and settled and established his home thereon with the intention of thereafter maintaining his home thereon with the intention of entering the same under the homestead laws of the United States when the said land should have been duly surveyed and open to entry under said laws, and from said time until the date of his death, continuously re-

sided upon said land, cultivated and improved the same.

V.

That at the time of the location and settlement of the said W. B. Leach and Beldon M. Delany upon the land above described, the same was vacant, unoccupied and unsurveyed public lands of the United States, and no claim or right of title to or interest in the said lands and premises or any part thereof had then been made by any person, persons or corporations whomsoever, nor was there any evidence whatsoever upon the said lands and premises or any part or parcel thereof, nor in the United States Land Office for the District in which said land was situated, to-wit: The Coeur d'Alene District, nor in the General Land Office at Washington, D. C., showing any right, title, or interest by, of or for any person, persons or corporations whomsoever to the said lands and premises or any part or parcel thereof, nor were there any marks, blazes, notices or other evidence whatsoever of the location, selection, claim or possession of the said premises located or traced upon the ground, or upon or near the same or any part thereof, nor had the boundaries thereof been traced or located by reference to any natural objects or permanent monuments, or marked or located by any monument of any kind or character whatsoever, and no person had prior to the location and settlement of the said W. B. Leach and Beldon M. Delany upon said lands, nor since said settlement and to date hereof, ever entered upon the same or attempted

to locate or reside thereon, nor any part or parcel thereof.

VI.

That on or about the 5th day of July, 1901, the Governor of the State of Idaho for and on behalf of the State of Idaho, duly made and filed with the United States Surveyor General for the State of Idaho the application of said State for the survey of Township 43 North, Range 4, E. Boise Meridian, (with other lands) and thereafter and on or about the 8th day of July, 1901, duly filed said application with the Commissioner of the General Land Office pursuant to the Act of August 18th, 1894, for the purpose of withdrawing the said lands from settlement or appropriation and of securing to said State the preference right of selection of said lands as provided by the terms of said Act and thereafter duly caused notice thereof to be published in the manner provided by said Act. That upon the filing of said application the said lands became and were withdrawn from the public domain and reserved from appropriation and were not subject to entry or appropriation by any person or corporation other than the State of Idaho to and until sixty (60) days from the date of the filing of Township plat of survey in the proper District Land Office.

VII.

That on the 4th day of June, 1909, the official plat of survey of the land and premises hereinbefore described was filed in the local land office at Coeur d'Alene City, Idaho, and on said date said lands first

became open for entry under the homestead laws of the United States, and on said date the said Beldon M. Delany duly made application to enter said lands in the manner and form required by law under the homestead laws of the United States, which said application was rejected by the local land office on the ground and for the reason only that the said application was in conflict with the selection theretofore made by the State of Idaho for indemnity school purposes, and with lieu selection list No. 71 theretofore made by the Northern Pacific Railway Company under the Act of March 2nd, 1899.

VIII.

That thereafter Beldon M. Delany appealed from said decision and ruling of the land office, and thereafter and on July 9th, 1915, the Commissioner of the General Land Office held that said Beldon M. Delany had no right to enter the said lands under the homestead laws of the United States upon the date of his alleged settlement, nor at the time he filed application to enter the same under the homestead laws of the United States, for the reason that the said lands had been duly selected by the Northern Pacific Railway Company, defendant herein.

IX.

That thereafter the said Beldon M. Delany duly appealed from the said decision of the Commissioner of the General Land Office to the Department of the Interior in the manner required by law, and thereafter and on the 18th day of November, 1915, the Department duly affirmed the decision of the Com-

missioner of the General Land Office so appealed from as aforesaid, and remanded the case with directions that Delany's application to enter be finally rejected upon the ground and for the reason that Delaney's application to enter the land under the homestead laws of the United States was based upon a settlement not made until after the Northern Pacific Railway Company had filed its selection list No. 71, Coeur d'Alene 02484 for the same land under the Act of March 2nd, 1899.

X.

That thereafter said Beldon M. Delany duly filed a motion for re-hearing of the decision last above mentioned, and thereafter and on the 29th day of January, 1916, the motion for re-hearing of said matter was denied on the grounds hereinbefore set forth, and thereafter said Beldon M. Delany duly filed a petition for the exercise of the supervisory power of the Hon. Secretary of the Interior to vacate and recall departmental decisions of November 18th, 1915, and January 29th, 1916; that thereafter the Hon. Secretary of the Interior denied said petition of Beldon M. Delany on the ground that prior to the settlement of Beldon M. Delany the Northern Pacific Railway Company had duly selected the lands under the act of March 2nd, 1899, and that notwithstanding that the said Northern Pacific Railway Company had in its lieu selection list No. 71, described the said lands in terms of future survey when made, and the case was finally closed.

XI.

That on the 23rd day of July, 1901, the Northern Pacific Railway Company filed with the General Land Office its selection list No. 71, which said list contained the following pretended description, to-wit:

“Lands, which when surveyed, will be the Northeast Quarter of Section 20, Township 43 North, Range 4, E. B. M.”

That at the time of filing said selection list No. 71 said pretended description was wholly imaginary, and no lands in the State of Idaho or elsewhere were or could be so designated or described, for the reason that at the time of filing same as aforesaid, no survey had been made or attempted, nor were there any surveyed lands in such close proximity thereto as to render such description and designation of said lands definite or certain or capable of being made definite or certain by any reasonable manner or in any other manner or at all, save and except the making of an official survey by the proper officers of the United States.

XII.

That neither the said Northern Pacific Railway Company, or any of its servants, agents, attorneys, or employees knew or pretended to know what lands were referred to in said pretended description, nor did said defendant then know that in the event of a survey thereafter that said pretended description would be applied to the lands and premises now oc-

cupied and claimed by this plaintiff as aforesaid, and which said pretended description was the sole and only description contained in said lieu selection list No. 71, and which said description was then and is wholly insufficient to locate and describe the lands and premises hereinbefore described and located and settled upon by said Beldon M. Delany as hereinbefore alleged, or any part or parcel thereof, or any land in the State of Idaho or elsewhere, for want of which description the said lieu selection list No. 71, and the selection of the said lands by the Northern Pacific Railway Company was and is wholly void and of no force or effect whatsoever.

XIII.

That at the time of the filing of said lieu selection list No. 71 by the said Northern Pacific Railway Company as aforesaid the said lands had been theretofore duly appropriated by the State of Idaho and at said time were withdrawn from the public domain and were not open to selection or appropriation by the Northern Pacific Railway Company under the Act of March 2nd, 1899, or in any manner or at all, and by reason of the making and filing of the prior application of the State of Idaho of the lands as hereinbefore alleged, the attempted selection thereof by the Northern Pacific Railway Company was void and of no force or effect.

XIV.

That thereafter and on the 16th day of June, 1916, letters patent to said land were issued to the

Northern Pacific Railway Company, a corporation, defendant herein.

XV.

Plaintiff is informed and believes, and therefore alleges the fact to be, that subsequent to the 16th day of June, 1916, and prior to the commencement of this action, the Northern Pacific Railway Company, a corporation, transferred and caused to be transferred to the defendant Edward Rutledge Timber Company, a corporation, all of its right, title and interest in and to the lands and premises hereinbefore described, and the said Edward Rutledge Timber Company, a corporation, now claims to be the owner of the legal title of the land and premises above described.

XVI.

That neither the said Northern Pacific Railway Company, a corporation, or the said Edward Rutledge Timber Company, a corporation or any agent, servant, attorney, or employee whomsoever or either of said defendants have ever been in possession of the said land and premises or any part or parcel thereof, but the possession thereof since the 1st day of April, 1901, has been and is now in this plaintiff and her predecessor in interest to the exclusion of all other person, persons, or corporation whomsoever; that neither of said defendants have ever complied with the laws of the United States so as to entitle them or either of them to claim any interest in or right or title to the said lands and premises or any part or parcel thereof as against this plaintiff.

XVII.

That the action and decision of the local land office rejecting the application of Beldon M. Delany to enter upon the land and premises hereinbefore described under the homestead laws of the United States on the 4th day of June, 1909, was and is contrary to law, and in violation of the rights of this plaintiff, and the approval of said decision rejecting said application of the said Beldon M. Delany by the Commissioner of the General Land Office, and the approval thereof by the Secretary of the Interior, were and are wrongful and unlawful and based upon an erroneous construction of the law, and upon a statement of facts upon and concerning which there was and is no conflict.

XVIII.

That long prior to the said 16th day of June, 1916, and on said date, and at the time of the issuance of the patent to the Northern Pacific Railway Company, a corporation, to the land and premises herein described, said Beldon M. Delany was and at all times since has been and at the time of the commencement of this action was, the owner and lawfully entitled to a patent for the legal title to said premises and each and every part thereof.

XIX.

That each and every, all and singular of the acts of the defendants herein and each of them of and concerning their attempted selection and claim in and to said land and premises, and all the acts and proceedings of the Commissioner of the General

Land Office and the Secretary of the Interior in connection therewith, and in the issuance of said patent are and were contrary to and without authority at law, and in violation of the rights of this plaintiff, and that at the time of the pretended initiation of said claim on the part of the Northern Pacific Railway Company, in and to said lands and premises, the said Northern Pacific Railway Company was wholly without any right or authority at law to select or claim the said land or any part thereof.

XX.

That subsequent to the commencement of this action the said Beldon M. Delany, the party instituting this suit as plaintiff, herein, died, leaving him surviving as his sole and only heirs at law three sisters and one brother, and that all of said heirs have conveyed all of their right, title and interest in and to the said premises herein described to Alra G. Farrell, one of said heirs. That the said Alra G. Farrell is now the only party interested in said land and premises and the sole and only person in interest as plaintiff in this action.

WHEREFORE, plaintiff prays that if she be adjudged and decreed to be the owner of the lands and premises herein described and entitled to the possession thereof, and in the possession thereof, and that the defendants and each of them be decreed to hold such title as they may possess under the patent of the United States in and to said premises in trust for this plaintiff, and for the sole use and behoof of

this plaintiff, and that they be decreed to convey the same to this plaintiff by proper deed of conveyance and that the title thereto be forever quieted in this plaintiff, and for her costs and disbursements in this action expended, and for such other and further relief in the premises as to the Court may seem equitable and just.

A. H. KENYON,
S. M. STOCKSLAGER,
Solicitors for Plaintiff.

(Duly verified).

Endorsed, Filed Oct. 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

ANSWER OF DEFENDANT NORTHERN PA-
CIFIC RAILWAY COMPANY TO AMEND-
ED BILL OF COMPLAINT.

Comes now the defendant, Northern Pacific Railway Company, and for its answer to the amended bill of complaint of the substituted plaintiff Alra G. Farrell, says:

1. This defendant admits that it is and was at all the times mentioned in the amended bill of complaint (hereinafter, for brevity, referred to as "the bill") a corporation organized and existing under the laws of the State of Wisconsin; and alleged that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and

laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. This defendant admits that the defendant, Edward Rutledge Timber Company, is and was at all times mentioned in the bill a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane in said State; and on information and belief alleges that previous to the times mentioned in the bill the defendant Edward Rutledge Timber Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. This defendant has no knowledge or information sufficient to form a belief as to whether, at any of the times mentioned in the bill or at the time of his death Beldon M. Delaney was a citizen of the United States, or was over the age of twenty-one years, or was qualified to enter or acquire title to

one hundred sixty (160) acres of land, more or less, under the homestead laws of the United States; or as to whether said Delaney ever resided upon the land described in the bill.

4. This defendant has no knowledge or information sufficient to form a belief as to whether W. B. Leach, named in the bill, located or settled upon the land described in the bill, viz: the Northeast quarter of Section 20, in Township 44 North, Range 4 East, B. M., or upon any part thereof, on or about the first day of April, 1901, or at any other time; or as to whether, if said Leach ever located or settled on said land, he did so with the intention of establishing or maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States; or as to whether he thereafter continuously or otherwise resided upon said land or cultivated or improved the same.

5. This defendant admits that the approved township plat of survey of the township in which the land described in the bill is situated, was not filed in the United States District Land Office at Coeur d'Alene, Idaho, which is the District in which said land is located, until the fourth day of June, 1909, and that until said date said land was unsurveyed; but alleges that long prior to said date the said land had been surveyed in the field by the official surveyors of the United States under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly

and plainly marked upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office according to law; and that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid.

6. This defendant has no knowledge or information sufficient to form a belief as to whether said Delaney acquired or purchased any alleged right or rights of said Leach, possessory or otherwise, in or to said land, or whether said Delaney ever located or settled on said land or established his home thereon, or whether if said Delaney ever located or settled on said land, he did so with the intention of thereafter maintaining his home thereon or with the intention of entering the same under the homestead laws of the United States, or whether he thereafter, continuously or otherwise, resided upon said land or cultivated or improved the same or was residing thereon at the time of his death. And this defendant further specifically denies each and every allegation contained in paragraph 4 of the bill.

7. This defendant admits and alleges that on and prior to the first day of April, 1901, and at all times thereafter until the twenty-third day of July, 1901, the said land was vacant, unoccupied and unsurveyed public land of the United States, and that no claim, right or title to or interest in the said land or any part thereof had attached or been initiated

by any person or corporation whomsoever; but denies that at any time after the twenty-third day of July, 1901, the said land was vacant, unoccupied or unappropriated public land of the United States, or free from claim, right or title; and denies that at the time of the alleged location or settlement thereon by said Delaney or at any time after the twenty-third day of July, 1901, there was no evidence upon the said land or in the United States Land Office for the district in which said land was situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., to show that said land was claimed by this defendant, or by the defendant Edward Rutledge Timber Company, or that the boundaries of said land had not then been traced, marked or located by monuments, or that there were no marks, blazes, notices or other evidences of the location, selection, claim or possession of said land located or traced upon the ground; and this defendant alleges that, on the contrary, the said land was at all times subsequent to the twenty-third day of July, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim, or open to settlement by said Delaney or any other person, under the homestead laws of the United States or otherwise; that the fact of such selection, appropriation and segregation was a matter of record and ap-

peared upon the fact of the records of the said United States District Land Office at Coeur d'Alene, Idaho, and upon the face of the records of the General Land Office at Washington, D. C., the same being the usual, proper and only legal records upon which such selection, appropriation and segregation could appear; that at the time said Delaney first went upon said land, and at the time of his alleged location and settlement thereon, and at all times thereafter, said Delaney had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; that said Delaney went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof, and of the defendant Edward Rutledge Timber Company's right thereunder, and in the hope that the claim of these defendants to the land might be defeated upon technical grounds, and that he, said Delaney, might acquire said land and the valuable timber thereon for purposes of speculation.

8. This defendant denies that said Delaney ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavor in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the

said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that said Delaney went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

9. This defendant admits that at some time subsequent to the 5th day of July, 1901, the Governor of the State of Idaho attempted to make an application, under the Act of Congress approved August 18th, 1894, for the survey of the township mentioned in paragraph 6 of the bill and a large number of other townships in the State of Idaho. But this defendant denies that such application, or purported application, was duly made, or made in accordance with the provisions of said act; and denies that such purported application was made to the Commissioner of the General Land Office, as required by the terms of said act; and denies that said purported application was made on or about the 5th day of July, 1901, or was filed in the office of the Commissioner of the General Land Office on or about the 8th day of July, 1901; and denies that the said Governor, or any other person, thereafter, duly or otherwise, caused notice thereof to be published in the manner provided by said act; and denies that upon the filing of said purported application the lands

described therein, or any thereof, became or were withdrawn from the public domain, or reserved from appropriation, or were not subject to entry or appropriation by any person or corporation other than the State of Idaho, to and until sixty (60) days from the date of the filing of the township plat of survey, or for any other period of time whatsoever.

10. This defendant alleges that at some time after the 5th day of July, 1901, the then Governor of the State of Idaho made and signed a writing purporting to be an application, under the said Act of August 18, 1894, for the survey of the townships referred to in the last preceding paragraph of this answer, which purported application was addressed to the Surveyor General for the State of Idaho and to the Commissioner of the General Land Office, and was by said Governor or at his instance, filed in the office of the Surveyor General at Boise, Idaho; that said Surveyor General thereafter transmitted said purported application to the Commissioner of the General Land Office, by mail, and the same was received in the office of the Commissioner of the General Land Office on or after, and not before, the 15th day of July, 1901; that after the receipt of said purported application the Commissioner of the General Land Office duly considered the same and held and decided that such application was excessive, improvident, illegal, and without effect, and that the same was not entitled to be recognized or allowed, and ordered that the same be rejected; that the said Gover-

nor was duly notified of such action by the Commissioner of the General Land Office; that no appeal from said order and decision of the said Commissioner, nor any motion of other action for the review, reversal or modification of the same, was ever taken by or on behalf of the State of Idaho; that said order and decision of said Commissioner was never revoked, modified or set aside, but at all times remained in force and effect; that the Commissioner of the General Land Office never gave notice to the Surveyor General, as required by the provisions of said Act of August 18, 1894, of the said purported application; and never, at any time prior to the month of January, 1905, gave notice to the Local Land Office of any of the districts in which the townships described in said application were situated, or to the Local Land Office at Coeur d'Alene, Idaho, of the said application or of the reservation of said townships, or any of them, as required by said act; that said purported application was wholly void and without effect; and that the Commissioner of the General Land Office and the Secretary of the Interior, in the proper exercise of the authority vested in each of them by law, have frequently and in a number of cases held that said purported application was and is illegal, void and without effect, and inoperative to effect a reservation or withdrawal of the townships therein described, or of any land situated in either of said townships, or to create any preference or other right in the State of Idaho, or to continue or create an obstacle to the selection or

other appropriation of any land in either of said townships by the defendant Railway Company, or any other person or corporation, or to any other claim to any of said lands under the public land laws of the United States, initiated or attaching prior to the filing of the township plat of survey of any such township. This defendant further alleges that the State of Idaho never made any valid selection or application to select the land described in the bill, or any part thereof, either before or after filing of the township plat of survey; and that the State of Idaho does not now claim or assert any right, title or interest in or to the said land or any part thereof.

11. This defendant alleges that on the 23rd day of July, 1901, the land described in the bill was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual Government survey; that on said 23rd day of July, 1901, the defendant Railway Company by its selection list No. 71, duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside

a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations, and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

12. This defendant alleges that on the 4th day of June, 1909, the official township plat of the survey of the township in which said land is situated, was filed in the said United States Land Office at Coeur d'Alene, Idaho, and that on said last men-

tioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 5 of said Act, a new selection list embracing the selections embraced in the said selection list of July 23, 1901, including the selection of the land described in the bill describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

13. This defendant admits that the said selection list No. 71 described the said land in the manner alleged in said bill, but alleges that said list was so filed in the United States Land Office at Coeur d'Alene, Idaho, and not in the General Land Office.

14. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of said land contained in said selection list was imaginary, or that no land in the State of Idaho or elsewhere was or could be so designated or described, whether for the reason stated in the bill or otherwise; and denies that at that time there were no surveyed lands in such proximity to the lands so selected as to render such description and designation definite or certain, or capable of

being made definite or certain, in any reasonable manner, or save and except by the making of an official survey by the proper officers of the United States; and denies that neither the defendant Railway Company nor any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to by such description, or that the defendant Railway Company did not then know that upon survey, such description would be applied to the land described in said bill; and denies that the description contained in said selection list was insufficient to designate, locate or describe the land so selected, or that the said selection was by reason of insufficiency of description or otherwise, void or of no force or effect; but alleges that, on the contrary, in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said Act.

15. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the land described in the bill, or any part thereof, had theretofore been duly or otherwise appropriated by the State of Idaho, or at said or any other time was withdrawn from the public domain (except by virtue of such selection by defendant Railway Company); and denies that the same was

not then open to selection or appropriation by the defendant Railway Company under said act of March 2, 1899, or in any manner, or at all; and denies that by reason of the making and filing of the said or any application or purported application of the State of Idaho for the survey of the said land, as alleged in the bill or otherwise, the said selection thereof by the defendant Railway Company was void or of no force or effect.

16. This defendant admits and alleges that shortly after the township plat of survey was filed in said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, but on the 10th day of June, 1909, and not on the 4th day of June, 1909, as alleged in the bill, said Delaney tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but this defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by said Delaney in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such

application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of said Delaney or of the plaintiff; and this defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

17. This defendant alleges that neither in the proceedings in the said Coeur d'Alene Land Office, nor in the General Land Office, nor before the Secretary of the Interior upon the said application of said Delaney to enter said land, nor otherwise in connection with the same, was it ever at any time or in any manner claimed or asserted by or on behalf of said Delaney, or by any other person, that the alleged claim or rights of said Delaney rested upon anything which had occurred prior to his alleged settlement on said land on June 21, 1903, or upon the alleged settlement and location thereon by said Leach, or that any claim or right of any kind whatsoever had attached or been initiated to said land prior to the selection thereof by the defendant Railway Company on July 23, 1901, or that at the time of the selection of said land by the defendant Railway company on July 23, 1901, the same was not then vacant and

unappropriated public land of the United States subject to such selection.

18. This defendant alleges that the said selection so made by the defendant Railway Company of the land described in the bill, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in the bill, a patent of the United States conveying the said land to the defendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

19. This defendant admits that it has conveyed the premises to the Edward Rutledge Timber Company, and alleges that said conveyance bears date July 17, 1916, and was made in pursuance of a contract between this defendant and said Edward Rutledge Timber Company dated October 5, 1903, whereby for valuable consideration paid to it by said defendant Edward Rutledge Timber Company, this defendant sold the land to said Edward Rutledge Timber Company and agreed and understook to convey the same; and this defendant admits that said Edward Rutledge Timber Company now claims to be the owner of the legal title to said land.

20. This defendant denies that neither the defendant Railway Company nor the defendant Ed-

ward Rutledge Timber Company, nor any agent, servant, attorney or employee of either of said defendants, have ever been in possession of said land or any part thereof; and denies that the plaintiff or said Delaney or his alleged predecessor in interest have been in possession of said land since the first day of April, 1910, to the exclusion of all other persons or corporations, or at all; and denies that the defendants have not complied with the laws of the United States so as to entitle them to claim said land as against said Delaney or the plaintiff; but alleges that, on the contrary, the defendant Railway Company has, in all respects, complied with all the laws of the United States and with the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office; and that by virtue of matters hereinbefore set forth the defendant Railway Company became and was entitled to the said land and entitled to receive patent therefor.

21. This defendant denies that any of the acts of proceedings of the defendant Railway Company concerning the said selection, or any of the acts or proceedings of the officers of the said Coeur d'Alene Land Office, or of the Commissioner of the General Land Office, or of the Secretary of the Interior in connection therewith, or in the issuance of patent to the defendant Railway Company as aforesaid are or were contrary to or without authority of law, or in violation of any rights of said Delaney or of the plaintiff; and denies that the rejection of said Delaney's said

application was wrongful or unlawful, or in violation of any right of said Delaney or of the plaintiff, or based upon an erroneous construction of the law, or upon a statement of facts concerning which there was and is no conflict; and alleges that all the acts and proceedings of the defendant Railway Company and of the officers of said Coeur d'Alene Land Office and of the Commissioner of the General Land Office and of the Secretary of the Interior in rejecting and confirming the rejection of said Delaney's said application and in approving the selection of said land by the defendant Railway Company and in issuing patent to it, were right and proper and in accordance with law.

2. This defendant denies that on the 16th day of June, 1916, or at the time of issuance of patent to the defendant Railway Company as aforesaid, or at any other time whatsoever, said Delaney or the plaintiff was the owner of said land or the holder of the legal title thereto or entitled to patent for the same; and denies that said Delaney or his heirs or other successors in interest or the plaintiff has or have now, or ever had, any right, title or interest whatsoever in or to the said land or any part thereof; and alleges that by virtue of its selection of the said land as hereinbefore set forth, and by virtue of the patent issued to it as aforesaid, the defendant Railway Company became and was the owner of said land in fee simple, free from any claim, right, title or interest of said Delaney or of the plaintiff or any other person whomsoever, except the defendant Edward Rutledge Tim-

ber Company; and that by virtue of the conveyance of said land by the defendant Railway Company, the defendant Railway Company, the defendant Edward Rutledge Timber Company became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest of said Delaney or of the plaintiff or any other person whomsoever, except the defendant Edward Rutledge Timber Company; and that by virtue of the conveyance of said land by the defendant Railway Company, the defendant Edward Rutledge Timber Company became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest to or in the same on the part of said Delaney or the plaintiff or any other person whomsoever.

23. Defendant admits that said Beldon M. Delaney, the party instituting this suit as plaintiff, died subsequent to the commencement of this suit but this defendant has no knowledge or information sufficient to form a belief as to whether said Delaney died testate or intestate, or as to whether he left any heirs at law; or as to who the heirs of said Delaney, if any, were or are; or as to whether the plaintiff, Alra G. Farrell, was or is an heir of said Delaney; or as to whether any heir of said Delaney has assigned, conveyed, or otherwise transferred to said plaintiff his supposed right, title or interest in the land described in the bill, or any thereof; or as to whether said plaintiff has in any manner acquired or succeeded to the supposed rights or interests in said land, or any

thereof, asserted or claimed by said Delaney.

WHEREFORE, this defendant prays that it be hence dismissed, with costs.

NORTHERN PACIFIC RAILWAY
COMPANY.

By R. H. RELF,
(Corporate Seal) Assistant Secretary.

CHAS. W. BUNN,
CANNON & FERRIS,
GRAFTON MASON,

Solicitors and of Counsel for Defend-
ant, Northern Pacific Railway Co.

(Duly verified)

Endorsed, Filed Oct. 31, 1917.

W. D. McReynolds, Clerk,

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 660.

ANSWER OF DEFENDANT EDWARD RUT-
LEDGE TIMBER COMPANY TO AMEND-
ED BILL OF COMPLAINT.

Comes now the defendant Edward Rutledge Timber Company, and for its answer to the amended bill of complaint of the substituted plaintiff, Alra G. Farrell, says:

1. This defendant admits that it is and was at all times mentioned in the amended bill of complaint (hereinafter, for brevity, referred to as "the bill") a corporation organized and existing under the laws of the State of Washington, with its principal office

and place of business in the City of Spokane in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. This defendant admits that the defendant Northern Pacific Railway Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Wisconsin; and on information and belief alleges that previous to the times mentioned in the bill the defendant Northern Pacific Railway Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. This defendant has no knowledge or information sufficient to form a belief as to whether, at any of the times mentioned in the bill or at the time of his

death, Belden M. Delaney was a citizen of the United States, or was over the age of twenty-one years, or was qualified to enter or acquire title to one hundred sixty (160) acres of land, more or less, under the homestead laws of the United States; or as to whether said Delaney ever resided upon the land described in the bill.

4. This defendant has no knowledge or information sufficient to form a belief as to whether W. B. Leach, named in the bill, located or settled upon the land described in the bill, viz: the Northeast quarter of Section 20, in Township 43 North, Range 4 East B. M., or upon any part thereof, on or about the first day of April, 1901, or at any other time; or as to whether, if said Leach ever located or settled on said land, he did so with the intention of establishing or maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States; or as to whether he thereafter continuously or otherwise resided upon said land or cultivated or improved the same.

5. This defendant admits that the approved township plat of survey of the township in which the land described in the bill is situated, was not filed in the United States District Land Office at Coeur d'Alene, Idaho, which is the District in which said land is located, until the fourth day of June, 1909, and that until said date said land was unsurveyed; but alleges that long prior to said date the said land had been surveyed in the field by the official surveyors of the United States under the direction of the

Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office according to law; and that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid.

6. This defendant has no knowledge or information sufficient to form a belief as to whether said Delany acquired or purchased any alleged right or rights of said Leach, possessory or otherwise, in or to said land, or whether said Delaney ever located or settled on said land or established his home thereon, or whether if said Delany ever located or settled on said land, he did so with the intention of thereafter maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States, or whether he thereafter, continuously or otherwise, resided upon said land or cultivated or improved the same or was residing thereon at the time of his death. And this defendant further specifically denies each and every allegation contained in paragraph 4 of the bill.

7. This defendant admits and alleges that on and prior to the first day of April, 1901, and at all times thereafter until the twenty-third day of July, 1901, the said land was vacant, unoccupied and un-

surveyed public land of the United States, and that no claim, right or title to or interest in the said land or any part thereof had attached or been initiated by any person or corporation whomsoever; but denies that at any time after the twenty-third day of July, 1901, the said land was vacant, unoccupied or appropriated public land of the United States, or free from claim, right or title; and denies that at the time of the alleged location or settlement thereon by said Delany or at any time after the twenty-third day of July, 1901, there was no evidence upon the said land or in the United States Land Office, for the district in which said land was situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., to show that said land was claimed by the defendant Railway Company or by this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments, or that there were no marks, blazes, notices or other evidences of the location, selection, claim or possession of said land located or traced upon the ground; and this defendant alleges that, on the contrary, the said land was at all times subsequent to the twenty-third day of July, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim, or open to settlement by said Delany or any other person, under the homestead laws of the

United States or otherwise; that the fact of such selection, appropriation and segregation was a matter of record and appeared upon the face of the records of the said United States District Land Office at Coeur d'Alene, Idaho, and upon the face of the records of the General Land Office at Washington D. C., the same being the usual, proper and only legal records upon which such selection, appropriation and segregation could appear; that at the time said Delany first went upon said land, and at the time of his alleged location and settlement thereon, and at all times thereafter, said Delaney had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; that said Delany went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof, and of this defendant's right thereunder, and in the hope that the claim of these defendants to the land might be defeated upon technical grounds, and that he, said Delany, might acquire said land and the valuable timber thereon for purposes of speculation.

8. This defendant denies that said Delany ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the

homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that said Delany went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

9. This defendant admits that at some time subsequent to the 5th day of July, 1901, the Governor of the State of Idaho, attempted to make an application, under the Act of Congress approved August 18th, 1894, for the survey of the township mentioned in paragraph 6 of the bill and a large number of other townships in the State of Idaho. But this defendant denies that such application, or purported application, was duly made, or made in accordance with the provisions of said act; and denies that such purported application was made to the Commissioner of the General Land Office, as required by the terms of said act; and denies that said purported application was made on or about the 5th day of July, 1901, or was filed in the office of the Commissioner of the General Land Office on or about the 8th day of July, 1901; and denies that the said Governor, or any other person, thereafter, duly or otherwise, caused notice thereof to be published in the manner provided by said act; and denies that upon the filing

of said purported application the lands described therein, or any thereof, became or were withdrawn from the public domain, or reserved from appropriation, or were not subject to entry or appropriation by any person or corporation other than the State of Idaho, to and until sixty (60) days from the date of the filing of the township plat of survey, or for any other period of time whatsoever.

10. This defendant alleges that at some time after the 5th day of July, 1901, the then Governor of the State of Idaho made and signed a writing purporting to be an application, under the said Act of August 18th, 1894, for the survey of the townships referred to in the last preceding paragraph of this answer, which purported application was addressed to the Surveyor General for the State of Idaho and to the Commissioner of the General Land Office and was by said Governor, or at his instance, filed in the office of the Surveyor General at Boise, Idaho; that said Surveyor General thereafter transmitted said purported application to the Commissioner of the General Land Office, by mail, and the same was received in the office of the Commissioner of the General Land Office on or after, and not before, the 15th day of July, 1901; that after the receipt of said purported application the Commissioner of the General Land Office duly considered the same and held and decided that such application was excessive, improvident, illegal, and without effect, and that the same was not entitled to be recognized or allowed, and ordered that the same be rejected; that the said Gov-

ernor was duly notified of such action by the Commissioner of the General Land Office; that no appeal from said order and decision of the said Commissioner, nor any motion or other action for the review, reversal or modification of the same was ever taken by or on behalf of the said Governor, or any other person, or by or on behalf of the State of Idaho; that said order and decision of said Commissioner was never revoked, modified or set aside, but at all times remained in force and effect, that the Commissioner of the General Land Office never gave notice to the Surveyor General, as required by the provisions of said act of August 18th, 1894, of the said purported application; and never, at any time prior to the month of January, 1905, gave notice to the local Land Office of any of the districts in which the townships described in said application were situated, or the local Land Office at Coeur d'Alene, Idaho, of the said application or of the reservation of said townships, or any of them, as required by said act; that said purported application was wholly void and without effect; and that the Commissioner of the General Land Office and the Secretary of the Interior, in the proper exercise of the authority vested in each of them by law, have frequently and in a number of cases held that said purported application was and is illegal, void and without effect, and inoperative to effect a reservation or withdrawal of the townships therein described, or of any land situated in either of said townships, or to create any preference or other right in the State of Idaho, or

to constitute or create an obstacle to the selection or other appropriation of any land in either of said townships by the defendant Railway Company, or any other person or corporation, or to any other claim to any of said lands under the public land laws of the United States, initiated or attaching prior to the filing of the township plat of survey of any such township. This defendant further alleges that the State of Idaho never made any valid selection or application to select the land described in the bill, or any part thereof, either before or after filing of the township plat of survey; and that the State of Idaho does not now claim or assert any right, title or interest in or to the said land or any part thereof.

11. This defendant alleges that on the 23rd day of July, 1901, the land described in the bill was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual Government survey; that on said 23rd day of July, 1901, the defendant Railway Company by its selection list No. 71, duly made selection of the said land under the provisions

of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park", approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules regulations, and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

12. This defendant alleges that on the 4th day of June, 1909, the official township plat of the survey of the township in which said land is situated, was filed in the said United States Land Office at

Coeur d'Alene, Idaho, and that on said last mentioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said act, a new selection list embracing the selections embraced in the said selection list of July 23, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

13. This defendant admits that the said selection list No. 71, described the said land in the manner alleged in said bill, but alleges that said list was so filed in the United States Land Office at Coeur d'Alene, Idaho, and not in the General Land Office.

14. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of said land contained in said selection list was imaginary, or that no land in the State of Idaho or elsewhere was or could be so designated or described, whether for the reason stated in the bill or otherwise; and denies that at that time there were no surveyed lands in such proximity to the lands so selected as to render such description and designation definite or certain, or capable of be-

ing made definite or certain, in any reasonable manner, or save and except by the making of an official survey by the proper officers of the United States; and denies that neither the defendant Railway Company nor any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to by such description, or that the defendant Railway Company did not then know that upon survey, such description would be applied to the land described in said bill; and denies that the description contained in said selection list was insufficient to designate, locate or describe the land so selected, or that the said selection was by reason of insufficiency of description or otherwise, void or of no force or effect; but alleges that, on the contrary, in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

15. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the land described in the bill, or any part thereof, had theretofore been duly or otherwise appropriated by the State of Idaho, or at said or any other time was withdrawn from the public domain (except by virtue of such selection by defendant Railway Company); and denies that the same was not

then open to selection or appropriation by the defendant Railway Company under said Act of March 2nd, 1899, or in any manner, or at all, and denies that by reason of the making and filing of the said or any application or purported application of the State of Idaho for the survey of the said land, as alleged in the bill or otherwise, the said selection thereof by the defendant Railway Company was void or of no force or effect.

16. This defendant admits and alleges that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, but on the 10th day of June, 1909, and not on the 4th day of June, 1909, as alleged in the bill, said Delany tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but this defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by said Delany in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such

application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of said Delany or of the plaintiff; and this defendant further denies that the decision of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

17. This defendant alleges that neither in the proceedings in the said Coeur d'Alene Land Office, nor in the General Land Office, nor before the Secretary of the Interior upon the said application of said Delany to enter said land, nor otherwise in connection with the same, was it ever at any time or in any manner claimed or asserted by or on behalf of said Delany, or by any other person, that the alleged claim or rights of said Delany rested upon anything which had occurred prior to his alleged settlement on said land on June 21, 1903, or upon the alleged settlement and location thereon by said Leach, or that any claim or right of any kind whatsoever had attached or been initiated to said land prior to the selection thereof by the defendant Railway Company on July 23, 1901, or that at the time of the selection of said land by the defendant Railway Company on July 23, 1901, the same was not then vacant and un-

appropriated public land of the United States subject to such selection.

18. This defendant alleges that the said selection so made by the defendant Railway Company of the land described in the bill, and the said selection list so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in the bill, a patent of the United States conveying the said land to the defendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

19. This defendant alleges that shortly after the selection of said land by the defendant Railway Company on July 23, 1901, and long prior to the time when said Delany went upon said land as alleged in said bill, this defendant entered into an agreement with the defendant Railway Company whereby the defendant Railway Company for a valuable consideration paid to it by this defendant, sold the said land to this defendant and undertook and agreed to convey the same to it by warranty deed; that thereafter and on or about the 5th day of October, 1903, this defendant and the defendant Railway Company entered into a subsequent written contract dated October 5, 1903, whereby the defendant Railway

Company, for the said valuable consideration so paid to it by this defendant, and in consideration of the said prior agreement for the sale of said land to this defendant, agreed and undertook to convey the same to this defendant as aforesaid; that on the 17th day of July, 1916, the defendant Railway Company, by warranty deed bearing said last named date, duly conveyed the said land to this defendant; and that this defendant now claims to be and is the owner of said land, and all thereof, in fee simple.

20. This defendant denies that neither the defendant Railway Company nor this defendant, nor any agent, servant, attorney or employee of either of said defendants, have ever been in possession of said land or any part thereof; and denies that the plaintiff or said Delany or his alleged predecessor in interest have been in possession of said land since the first day of April, 1901, to the exclusion of all other persons or corporations, or at all; and denies that the defendants have not complied with the laws of the United States so as to entitle them to claim said land as against said Delany or the plaintiff; but alleges that, on the contrary, the defendant Railway Company has, in all respects, complied with all the laws of the United States and with the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office; and that by virtue of matters hereinbefore set forth, the defendant Railway Company became and was entitled to the said land and entitled to receive patent therefor.

21. This defendant denies that any of the acts or proceedings of the defendant Railway Company concerning the said selection, or any of the acts or proceedings of the officers of the said Coeur d'Alene Land Office, or of the Commissioner of the General Land Office, or of the Secretary of the Interior in connection therewith, or in the issuance of patent to the defendant Railway Company as aforesaid are or were contrary to or without authority of law, or in violation of any rights of said Delany or of the plaintiff; and denies that the rejection of said Delany's said application was wrongful or unlawful, or in violation of any right of said Delany or of the plaintiff, or based upon an erroneous construction of the law, or upon a statement of facts concerning which there was and is no conflict; and alleges that all the acts and proceedings of the defendant Railway Company and of the officers of said Coeur d'Alene Land Office and of the Commissioner of the General Land Office and of the Secretary of the Interior in rejecting and confirming the rejection of said Delany's said application and in approving the selection of said land by the defendant Railway Company and in issuing patent to it, were right and proper and in accordance with law.

22. This defendant denies that on the 16th day of June, 1916, or at the time of issuance of patent to the defendant Railway Company as aforesaid, or at any other time whatsoever, said Delany or the plaintiff was the owner of said land or the holder of the legal title thereto or entitled to patent for the same:

and denies that said Delany or his heirs or other successors in interest or the plaintiff has or have now, or ever had, any right, title, or interest whatsoever in or to the said land or any part thereof; and alleges that by virtue of its selection of the said land as hereinbefore set forth, and by virtue of the patent issued to it as aforesaid, the defendant Railway Company became and was the owner of said land in fee simple, free from any claim, right, title or interest of said Delany or of the plaintiff or any other person whomsoever, except this defendant; and that by virtue of the conveyance of said land by the defendant Railway Company to this defendant became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest to or in the same on the part of said Delany or the plaintiff or any other person whomsoever. .

23. Defendant admits that said Belden M. Decient to form a belief as to whether said Delany died subsequent to the commencement of this suit; but this defendant has no knowledge or information sufficient to form a belief as to whether said Delany died testate or intestate, or as to whether he left any heirs at law; or as to who the heirs of said Delany, if any, were or are; or as to whether the plaintiff, Alra G. Farrell, was or is an heir of said Delany; or as to whether any heir of said Delany has assigned, conveyed, or otherwise transferred to said plaintiff his supposed right, title or interest in the land described in the bill, or any thereof; or as to whether said plaintiff has in any manner acquired or suc-

ceeded to the supposed rights or interests in said land, or any thereof, asserted or claimed by said Delany.

WHEREFORE, this defendant prays that it be hence dismissed, with costs.

EDWARD RUTLEDGE TIMBER
(Corporate Seal) COMPANY.

By WM. J. MERRIGAN,
Secretary.

STILES W. BURR,
St. Paul, Minnesota.

SKUSE & MORRILL,
Spokane, Washington.

Solicitors and of Counsel for
defendant, Edward Rutledge
Timber Company.

(Duly verified.)

Endorsed. Filed Nov. 5th, 1917,

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

No. 660.

ABSTRACT OF EVIDENCE.

The following is an abstract of so much of the evidence introduced on the trial of the above entitled case as is material to the questions raised on this appeal.

At the commencement of the trial, after calling the witness W. B. Leach but before the latter had testified, counsel for plaintiff, Mr. Kenyon, stated to the Court, in substance, that while it was alleged in the

complaint that the witness W. B. Leach settled on the land in suit on or about the first of April, 1901; and while this allegation had been made in good faith on the strength of information believed to be correct; it had been ascertained by conference with the witness Leach and others, immediately previous to the trial, that Leach did not in fact make settlement on the land until the year 1902; so that the issue of priority based upon the allegation of settlement in April, 1901, was eliminated from the case.

W. B. LEACH, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I settled upon the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M. in the spring of 1902. I built a cabin and of course cut a little wood around there, opened up a little, and done what little improvement I could, and I put up notices on the corners of this land which was then unsurveyed. We measured this land out. Ed Kleinard, the man who located me, helped me put up the notices. The notices stated that I had taken up 160 acres of land as a homestead. Put a notice on each corner and plazed the line around the land. I also kept my name written on the door. No one else ever laid any claim to this ground while I was there. I made my home there from about May 22nd, until about June 23, 1903, the following year, when I let Delany have it. I sold and turned over to Delany all my improvements, cooking utensils, bed and table, and

what I had there. He took possession and established his home there at that time.

I was born in the United States, and was competent at that time to acquire title to land under the homestead laws.

ED KLEINARD, called as witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

I reside at Clarkia, Idaho, where I have lived close to twenty years. I know W. B. Leach the witness who just testified. In May, 1902, I located him upon what is now the Northeast Quarter of Section 20, Township 43, North Range 4 E. I blazed out the claim, and when I took him on it I put up notices, took an ax and blazed the line around it from one corner to the other, and posted a notice on each corner, stating that Leach claimed a half mile square within the blazed line as a homestead. I was a witness to his notices.

I was back there again in July, 1904. I saw very good improvements on the land. He had done some clearing. I think he built a new cabin, because it was not the same cabin that Leach built. It was built of logs. It was large enough to stand the test as far as being big enough to comply with the homestead laws. I should judge it was 14x16, or 12x16, or something like that. About seven or eight feet high. Had doors and windows. It was furnished at this time with cooking utensils, beds and bedding. I stopped there over night. There was a little garden

in the clearing. About two acres was cleared in all; not all this was in cultivation at that time. It looked as though it had been cleared too late to put in a crop, about one-half acre was in crop. The garden appeared to be cultivated and cared for.

I was on the claim again a couple of times in 1910. First time about the latter part of Septemer. I found a little better improvements than before, some fencing and more clearing and more garden. There was a couple of acres cleared any way, and it seemed to be all fenced. He had two good buildings there, what he called a barn and the cabin. He had constructed a new and better cabin and used the old one for a barn. The cabin had a floor of split cedar hewed with an adz, and a shake roof. It was well furnished and well stocked with supplies.

Delany and his brother were there and had been fighting fire there at the time, there was fire all around there at that time. I was engaged in fighting fire a month, and they were at it some time before I went in. Most of the time while they were fighting fire they lived in Delany's cabin, there at his home.

I was there again in 1912. The improvements were much the same as I saw in 1910, only a little more clearing. All of the ground was planted except what was in hay. He had an acre and a half or two acres in hay, and about one-half acre in garden, about two acres all together. There was no one on the place when I was there in 1912.

CROSS EXAMINATION

This is agricultural land. It would grow crops if it was cleared. It is pretty rough, and has some ra-

vines running through it, and is covered with heavy timber. There are flat benches on it but most of it is rough land. I heard Leach say his cabin burned, and Billy Delany, as he called himself, went in as soon as it was burned and built another one. I remember of his building it. There was about two acres cleared in 1912; that much any way and there might have been four, I don't know. There was pretty close to two acres in 1904, but it was not thoroughly cleared yet. I did not see any one there when I was there in 1904. He had the brush cut and he went in and done some logging right after that, took teams in there and logged. I saw them with the teams in there in 1910. He had his brother's team in there.

RE-DIRECT EXAMINATION

If there was no timber on this land you could cultivate about eighty acres of it.

ALRA G. FARRELL, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I am the plaintiff in this case. I am the sister of Beldon M. Delany, the party who started this action. He died on November 21st, 1916. He had never married, and left no father or mother. He was survived by three sisters and a brother, to-wit: David Delany, Alice Delany McDonald and Lena Delany Lohoefer and myself.

Q. Those are all the brothers and sisters?

A. Yes.

He left no child of any deceased brother or sister.

Alice Delany McDonald is married, her husband's name is Lee McDonald. Lena Delany Lohoefer is married, and her husband's name is G. A. Lohoefer. David Delany is a bachelor.

Plaintiff's Exhibit No. 1, being a quit claim deed from Alice Delany McDonald, Lee McDonald, David Delany, Lena Lohoefer and G. A. Lohoefer to Alra G. Farrell, conveying all of their right, title and interest in and to the Northeast Quarter of Section 20, Township 43, North Range 4, E. the land involved in this action, identified and introduced in evidence.

Mr. Burr: "I don't raise any question of the sufficiency of the deed as a conveyance from those people of what rights they were able to convey, but I don't mean by that I think they were competent to convey, or that they had any title to convey."

I know that my brother Beldon M. Delany was making his home upon this land at the time of his death. Beldon M. Delany was a native born citizen of the United States, about 23 years of age. He had never made a homestead entry prior to his settlement upon this land, and was not at that time the owner of any land.

IRA MCPEAK, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I live at Clarkia, Idaho, where I have lived since the fall of 1892. I knew Beldon M. Delany prior to 1900, before we went into the Marble Creek country. I met him on his place on Marble Creek in

July, 1903, what is now the Northeast Quarter of Section 20, Township 43, North Range 4, E. I had a homestead at that time partly on Section 19 and partly on Section 20. Our cabins were a little over a half mile apart. I settled there in 1901. Visited him a couple of times in July 1903. He built a cabin. Leach's cabin I think burned in 1902. Delany built a log cabin with a shake roof, about 14x16 feet in size, had doors and windows. Delany lived in it. He had stocked it with provisions and cooking utensils. He put in a floor. There was a little clearing around the cabin at that time and planted to a little garden stuff. I saw Delany there in February, 1904. He was living there at that time. He was living there in July, 1904. I was at his place then. He had a little more cleared. He had a garden of potatoes, radishes, lettuce and such things. The garden seemed to be well cared for. I saw him there three or four times during the summer at different times. I didn't go in in 1905 until late, about July or August. Delany had his garden in at that time. He had something like an acre cleared. Practically all that was cleared was in crop. Some timothy and some small garden truck. I was there a number of times that summer and know that the garden and crop was cultivated and cared for. Delany was making his home there then.

I saw him there again in 1906. We generally went in as early as the snow would be off so we could get in. He was there when I went in in 1906. He cleared some more land. Planted and cultivated what he

had already cleared, planted some more timothy and grain, I believe he had some oats in and some garden stuff and potatoes. Probably a quarter of an acre in garden stuff and potatoes. I saw him there as late as September, possibly October.

I also saw him there in the summer of 1907, I couldn't say exactly what date. His clearing and improvements were in good shape that year, he had some in garden and had cleared a little bit land. I next saw the place before Delany died, in August, 1911. Delany was not there when I was there in 1911. At that time he had between two and three acres cleared. He had some timothy and some grain too. I lived on my claim until July, 1910. Up until that time Delany made his home on this piece of land. He was working there most of the summer of 1910. He done quite a little clearing, and built a new cabin. At that time he had this house, and what he called a tool house, and a barn, and something like two or three acres cleared. He had a log and brush fence around his clearing. The cabin had a puncheon floor. His brother was living there with him. They were both working on the claim. The cabin at that time was furnished with cook stove, some chairs, and cooking utensils of all kinds that a person would need, and dishes, and there was also a supply of provisions. His improvements were as good, if not better, as most of the settlers in the vicinity. Probably one-half of the land would be suitable for crops if the timber was cleared off.

CROSS EXAMINATION

If the land was cleared I think you could plow and crop one-half of it, something like that. The land is covered with heavy timber. It is comparatively level about the clearing. It is a rough and broken quarter. I lived on my homestead there from 1901 most of the time until 1911. I was burned out in 1910, the year of the big fire, but went back in 1911. Have not been there since.

The Court: Are your other witnesses along somewhat the same lines, Mr. Kenyon?

Mr. Kenyon: Along the same lines, your honor.

The Court: Are you going to controvert the facts generally shown by these witnesses, Mr. Burr?

Mr. Burr: I don't think we are going to controvert, your honor, but I would prefer to have the showing made by the witnesses; but we have no evidence to oppose the evidence that is being given here on the question of subsequent cultivation.

The Court: Then I see no use of putting the other witnesses on. In other words, if you are not going to put any testimony in relative to these general matters as to cultivation and improvement.

Mr. Burr: We are not going to dispute it at all.

The Court: I can't see that other witnesses then would help you any, because I shall assume that these witnesses are telling the truth, if it is not controverted. If there is any respect in which they can supplement it, very well.

Mr. Burr: I think there is a marked insufficiency of proof, your Honor.

The Court: That may be. I understand your position. You are going to contend that as a matter of law this proof is insufficient, assuming it to be true.

Mr. Burr: Assuming it to be true. But I am not going to contend that it is not true.

ORAL AVERY, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I live at Clarkia, Idaho, where I have resided for 15 years. I knew Beldon M. Delany in his life time, and had a homestead near his. I settled there in 1904. I first met Delany on his claim in the summer of 1904. He was there working, he had a cabin and some clearing. I didn't see him any more until the next summer. He had been there and done some more improvements. In 1905 I helped him saw lumber for a cabin floor and helped him fix up the cabin. In 1906 I also went in there in the summer and saw him on his claim and working and improving the land, and I was there in the fall of 1907. He was not there but I could tell from the way his land looked he had been there. My sister had a claim at Clearwater. I used to go through there by his claim to see her two or three times a year, going back and forth, and he always kept up his improvements, also had in a garden, and the cabin was also in good fix. In 1910 was in several times and got supplies, meat and flour, from there to fight fire, and Delany was fighting fire in 1910 for about thirty

days. In the summer of 1912 I went to stay at his place. In 1912 there was a house, a barn, tool house, and cellar or root house, and about three acres, or maybe three and a half acres cleared, all in cultivation.

IRA MCPEAK, a witness on behalf of the plaintiff being re-called, testified as follows:

DIRECT EXAMINATION

On June 21, 1903, the nearest surveyed line to the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M., was the east line of Township 43, North Range 2, E., B. M. $7\frac{1}{2}$ miles distant. The land between these two lines was very rough and mountainous, most of it covered with heavy timber.

The foregoing testimony of the witness McPeak was seasonably objected to by counsel for defendants, on the ground that the same was incompetent, immaterial and not the best evidence, and the same was received by the Court subject to the objection.

CROSS EXAMINATION

The South line of Township 34, North Range 4, E. B. M. was surveyed at that time. I think that line was a little farther away from Delany's homestead.

Plaintiff's Exhibit 2, Deposition of Clay Tallman, Commissioner of the General Land Office, introduced in evidence, the material portion of which is as follows:

. The Commissioner of the General Land Office of

the United States is the custodian of all the records and files of the Land Department.

Taking advantage of the information acquired through the instrumentality of the officers, clerks and employes of the General Land Office, whose business it is to attend to the details of the work of that bureau, I will say that the records of the General Land Office show that claims were initiated to the Northeast quarter of Section 20, Township 43, North Range 4, E. B. M. State of Idaho, prior to the survey of said tract. The records of the office show that the survey of said township was approved November 24, 1908, and filed in the local United States Land Office at Coeur d'Alene, Idaho, on June 4, 1909. The records further show that on June 10, 1909, one B. M. Delany filed homestead application on the Northeast Quarter of said section, in which application he alleged settlement of this land on June 21, 1903.

The records of the office show that as early as July, 1901, the Governor of the State of Idaho filed an application in the office of the United States Surveyor General for the survey of this Township 43, North Range 4, E. and other townships, such application being made under the Act of August 18, 1894, for the purpose of satisfying grants made by Congress to the State of Idaho.

The records of this office further show that as early as July 23, 1901, the Northern Pacific Railway Company selected said Northeast Quarter, with other lands, under its list No. 71, under the Act of March 2, 1899 (30 Stat. 993), and, further, that on

June 4, 1909, the Railway Company filed a re-arranged list describing the tracts according to the Government survey. So far as I have been able to inform myself, these are all of the claims initiated or attempted to be initiated, to the lands in question prior to the filing of the approved plat of survey on the date I have stated.

I have caused an examination of the records and files of my office to be made for the purpose of determining whether these applications to which I have just testified are the only ones shown of record, and for the purpose of ascertaining whether or not there were any other claims initiated or attempted to be initiated, prior to the filing of plat of survey, and to the best of my knowledge and information, the claims I have described were all the claims initiated or attempted to be initiated, to the lands in question, as shown by the records of this office, prior to the filing of the plat of survey.

The papers marked Exhibit "A" consist of a bunch of certified copies of records of the General Land Office, under one certificate, being described in the certificate as "copy of application for survey by the Governor of Idaho under the Act of August 18, 1894, and a copy of School Indemnity List Coeur d'Alene 02604, with copies of papers and letters relating to said application and list, and a copy of General Land Office decision dated July 16, 1914, relating to State Indemnity Selection List Coeur d'Alene 02604 and 02484, and other lists." As to what these papers are, they show for themselves. As to the

date of filing of the respective papers, I can only testify as to the dates shown on the papers themselves, which is the best and only information available. The application for survey to which I just referred is the first paper at the top of this bunch of certified copies, which for identification I have marked "A-1" in the upper right-hand corner. So far as I know, these were all the papers that were considered in connection with the decision of the conflicting claims to this township. It should be stated, however, that the application for survey embraces several townships, the status of many of which is doubtless the same. I am unable to state what if any other papers in connection with the disposition of claims to the land in other townships embraced in said application for survey might have been considered by the adjudicating officers in deciding the conflicting claims referred to, to the NE $\frac{1}{4}$ Section 20, Township 43, N., Range 4 E.

"Q. Please state whether in the usual orderly course of business any other papers would be properly considered.

"A. It seems to me that any papers, decisions or data before the office or Department, relating to other townships in the same application for survey similarly situated might have been properly considered in connection with these conflicting claims to this land here at issue for whatever they were worth.

"O. Do you know of any such, and if so please state.

"A. I do not know."

The certified copies handed me and marked Exhibit "B" for identification, consist of copies of Clear List No. 109, Northern Pacific Railway Company, and papers and letters relating thereto. The papers handed me and designated as Exhibit "C" consist of copies of selection list No. 71 of the Northern Pacific Railway Company, and papers and letters relating thereto, and designated on the Land Office records as Coeur d'Alene 02484. To the best of my knowledge and belief they are all of the records and files pertaining to the list named, except copy of the final patent, copy of the notes of survey of the township, plat of survey and tract book records. There may be also confidential reports of special agents bearing on some or all of the lands referred to in this list, which are not considered a part of the public records, but so far as I can find, there are no records or files respecting these lands which need to be considered as confidential, for the reason that it appears that under date of May 13, 1915, the Acting Director of the Geological Survey certified with respect to this section 20, and other lands, that the records of the Survey indicate that there are no valuable deposits of coal or other minerals within the area specified, and that the lands have no valuable power site or reservoir possibilities. A copy of this certificate is included in the certified copies referred to under Exhibits "B" or "C". I have caused an examination to be made, and to the best of my knowledge and belief this is the only paper of that charac-

ter with respect to this particular section of land bearing on this railroad selection.

Exhibit "D" is copies of the records and files of the General Land Office pertaining to homestead entry of Beldon M. Delany, the same being designated on the records as Coeur d'Alene 02539. To the best of my knowledge and belief, they are all of the papers on file in this office relating to the homestead proceedings in question. I do not mean to say that these are all the records and files in this office in any way relating to the land in question, for as appears by my testimony there were other claims filed for the land, also there are on file the notes of survey of the land and the plat of such survey.

Q. In the regular orderly course of business, do you know of any other files or papers that would have been proper to consider in connection with this homestead claim?

A. In all cases of entries and selections for public lands, the tract book records of the General Land Office and of the local office, and the plats filed in the local office on which entries and selections as a rule are marked, are proper and necessary subjects of reference in determining rights to public lands.

Q. Please state upon what records and files in case where there had been no hearing an application for homestead entry would be considered.

A. It would be considered on the basis, first, of the papers constituting the application under consideration, secondly, all conflicting applications to enter or select, or entries or selections, if any, for the

same land as disclosed by the tract book records, local office plate, or indexes, together with all the records and files constituting or making up any such conflicting claims that might be found, inclusive of withdrawals by the Government, as shown by such records.

Q. Would our would not that have anything to do with the question whether he complied with the homestead law under which his application was made?

A. Not necessarily, but they might. Of course the validity of the homestead entry must stand on its own facts and the acts and performances of the entryman in compliance with the law. The other records and files might be of such a character, however, as to show that he had not complied with the law, and place the Government on inquiry before proceeding to allow patent.

Q. If you know of any other records, files or papers that were considered in connection with the question whether the homestead applicant complied with the law, please state what it is.

A. I know of no other records or files bearing on the compliance of the homestead entryman with the law. It is understood of course that this answer refers to the affirmative acts of the homestead entryman in compliance with the requirements of the homestead law and is not intended to have any bearing on the questions of conflicts that may have arisen by reason of other and different claims to the same land.

The papers handed me marked Exhibit "E" consist of a copy of the field notes of the survey of the subdivisional lines of Township 43, North Range 4, E. Boise Meridian, Idaho, so far as they pertain to section 20 of said township and range, and they are complete so far as concerns the subdivisional lines of said section 20. After a careful search of the records which I have caused to be made in this office, to the best of my knowledge and belief these are all the records and files of the General Land Office relating to the three claims which I have mentioned, with the exceptions heretofore noted, and they are all of the papers, files and records that would have been considered in the usual and ordinary method of transacting business in the Land Department.

CROSS EXAMINATION, BY MR. BURR:

I intended to state, for instance in the homestead case, that these certified copies include all the papers filed and all the papers or records in our office in connection with that case. I do not mean to say that in making decisions the records and files in the other related cases were not also considered. So far as I know, however, I don't know of any papers outside of these files that could have been considered in the disposition of any one of these cases. The rule is to keep all the papers in a case that is appealed from the General Land Office in one record. When the Department is through with that record, the entire record is returned to our office for the files. Referring to Exhibit A-1, in the light of this paper it-

self and of related papers and correspondence, I should say that the filing mark "Received July 8," indicated the date of the receipt of this paper in the office of the Surveyor General at Boise, Idaho.

I do not mean to say that this set of copies Exhibit "A" contains all of the records of the department and the proceedings of the department or of the General Land Office relating to that application for survey. I think I mentioned in a previous answer to a question on direct examination that the application for survey in question covers a number of townships. I do not know at present, nor do I mean to testify, that the various sets of certified copies referred to include all of proceedings with respect to all the tracts of land referred to in that application. There may have been many proceedings on other lands in no way connected with this township or section. It is not at all unlikely or improbable that in passing upon the question of the validity of this application for survey with respect to land in Township 43 N., Range 4 E., the department and the General Land Office might well have considered, and possibly did consider, the records and proceedings relating to that application which would be found in files relating to different townships. In fact, I understand that these townships are involved in the so-called Marble Creek cases, with respect to which there has been a good deal of departmental litigation during past years. I do not wish to be understood to testify that the certified copies heretofore referred to in my testimony cover all papers considered in connection with the

conflicting claims in this township. If I did so testify, it was inadvertent. I cannot testify as to what papers some adjudicating officer, either in my office or in the Department of the Interior, may have considered in the decision of any particular case, but I do intend to testify to the fact that to the best of my knowledge and belief such copies include all of the official records in the cases in question which such adjudicating officers could have had before them at the time of making the decision in question, insofar as such papers consist of the records and files of papers filed with specific reference to these particular cases.

Q. You have testified that in the usual and order course of business in the adjudication of cases of this character, other papers on file in other so-called cases might properly be considered. Now do you wish to be understood to testify as to whether or not the adjudicating officer passing upon the conflicting claims to this land did or did not consider papers in other cases, and that it is not improbable that it might have been done?

A. It is possible. In the handling of this or any other cases the guide of the officers under ordinary circumstances is the tract books which are intended to show all conflicting claims to the particular tracts of land involved. They would very naturally examine the records in those other cases unless they were old cases, which had been entirely closed and therefore need not be considered. Such records might refer to still other cases similar or identical in char-

acter, the consideration and disposition of which might have some bearing on the case to be adjudicated.

Q. Then from your answer and from what I know of departmental practice, I take it that the papers considered in dealing with the validity of a homestead claim with regard to conflict with other claims to the same land would very likely be found in the file of that particular case, but that in dealing with the question of the right of the Railway Company selecting a number of tracts of land, or such a question as that, or an application for survey involving a number of townships, it would be much more probable that rulings and orders and proceedings and testimony taken in cases involving other tracts of land but the same selection list or the same application for survey, would be considered?

A. Certainly.

Q. The file relating to a particular contest between an individual settler, claimant and railway company, or the State of Idaho, or relating to a particular homestead claim would not be likely to contain papers bearing upon the validity of the railway selection or the State selection.

A. Not necessarily, and not likely insofar as such validity or invalidity was in no way concerned with the homestead.

In the ordinary course of our practice and procedure a complete showing might not be in the file relating to the individual claim. The validity of one claim might depend upon the facts in the conflicting

claim, and insofar as the facts pertaining to one claim affect the other, somewhere in both records evidence of that fact should appear.

RE-DIRECT EXAMINATION

I did not state that there were other records pertaining to other conflicting claims as against that of Delany, for I knew of none such. I did state with respect to the application for survey, a copy of which appears in Exhibit "A", that such application included a large area of lands other than this section 20 under consideration, and that there may have been various other examinations made and decisions rendered with respect to such other claims which might disclose matters properly to be considered, and which might have been considered fully, in connection with conclusions arrived at on this matter of application for survey. It is my belief, from the examination we have made of the record, that there is nothing else of record other than what is contained in these various sets of certified copies by which the conflicting claims of these conflicting claimants could be determined, but I cannot presume to state that no other cases or records were taken into consideration in the determination of the rights of these parties. Reference has already been made to the Thorpe case, the Daniels case, and other cases decided by the Secretary of the Interior on appeal from the General Land Office, all of which I understand involved closely related questions. Where cases are reported in the published reports of the Secretary

of the Interior, the volume of the land decisions in which it is published is as a rule pointed out in the citation, but there are many decisions of the Secretary of the Interior that do not appear in the published decisions. They are all public record available to the public, but the land decisions that are published are selected decisions and constitute only the important and particularly leading cases.

Mr. Burr: Following your Honor's suggestion, we consent to the introduction of the deposition of Commissioner Tallman, with the understanding that it does not apply to the exhibits referred to in that deposition and attached to it, which I think should be offered separately.

Plaintiff's Exhibits 2-A, 2-B, 2-C, 2-D, and 2-E admitted in evidence.

Plaintiff rests.

Defendants' Exhibits No. 1, 2 and 3 admitted in evidence.

It is conceded on the part of plaintiff that the records of the United States Land Office in Coeur d'Alene, do not show any withdrawal of the land on the State's application for survey, until the one made by the letter of January 20, 1905.

Defendant rests.

ABSTRACT OF EXHIBITS.

Plaintiff's Exhibit "2-A" is in part as follows:

Boise, Idaho, July, 5th, 1901.

The U. S. Surveyor-General for Idaho, and the

Honorable Commissioner of the General Land Office.

Sirs:—

The undersigned Governor of the State of Idaho, hereby applies under the provisions of the Act of Congress approved August 18th, 1894, for the survey of the following townships, with a view to satisfy the public land grants made to the State of Idaho by the Act of Congress approved July 3rd, 1890, admitting said State into the Union, and subsequent Acts amending the same:

Township 43 N., R. 4 E. * * * *

(And other lands, describing eighteen townships in all.)

Very respectfully,

F. W. HUNT,
Governor.

DEPARTMENT OF THE INTERIOR.

Office U. S. Surveyor General,
District of Idaho.

Boise City, July 10, 1901.

Honorable Commissioner of the
General Land Office,
Washington, D. C.

Sir:—

I have the honor to submit herewith an application of the Governor of the State of Idaho for the survey of the following townships:

Township 43 N., R. 4 E. * * * * (And

other land, describing eighteen in all).

* * * * *

Based upon the Governor's application, I recommend the survey of the townships stated, with the exception of the three included or to be included in awarded contracts, but it is not deemed advisable to proceed with advertising for bids until after the demands of settlers can be more accurately determined.

Very respectfully,

JOSEPH PERRAULT,

U. S. Surveyor General for Idaho.

(Endorsed as follows) U. S. General Land Office.

Received July 15, 1901.

United States Surveyor General

Boise City, Idaho.

Dated July 10th, 1901.

Subject.

Submits Division E application for the Governor of Idaho for certain surveys.

See to Surveyor General July 10, 1901. Feb. 12, 1902.

See to F. W. Hunt Governor Boise, Idaho, and Hon.

H. Heitfeldt, U. S. Senate, February 10, 1902.

File July 15, 1901.

See to F. W. Hunt, Governor, Idaho, Oct. 6, 1902.

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE.

Washington, D. C., July 19, 1901.

Subject:

Application of the Governor for public surveys, Idaho.

The U. S. Surveyor General,
Boise City, Idaho.

Sir:

I am in receipt of your letter of July 10, 1901, enclosing the application of the Governor of Idaho, dated July 5, 1901, for the survey of 17 full townships and one fractional township, designated as follows:

Tps. 43, N. R. 4 E. (And other townships).

* * * * *

In reply you are requested to secure from the Governor, or the proper officer, a statement showing the *total area* of lands selected to date; also the approximate area of *all* of the townships heretofore applied for by the Governor; also to report whether or not *the total area* to which the State is entitled under the enabling act has not, or may be selected from the lands embraced in the townships heretofore applied for, the total number of which (approximately) is 206.

Pending the receipt of the report of the Governor no action will be taken in the matter of withdrawing from further disposal the lands in the 18 designated townships named in the Governor's application of July 5, 1901.

In the opinion of this office the areas embraced in the townships designated in the applications for survey heretofore made by the Governor from April, 1895 to July 1, 1901, are deemed sufficient to enable the State officers to make the requisite selections *in full*, and that the public interests will *not* be sub-

served by further withdrawals of lands from settlement, pending the settlement of the State's rights under the Act of Congress approved July 3, 1890, admitting Idaho into the Union, and subsequent acts.

Very respectfully,

BINGER HERMANN,
Commissioner.

Department of the Interior.

General Land Office.

Washington, D. C., February 12, 1902.

Subject:

Application by the Governor for public surveys.
Idaho.

The U. S. Surveyor General,
Boise, Idaho.

Sir:

Referring to your letters of July 10, August 17, and August 20, 1901, transmitting the applications of the Governor of Idaho for the survey of designated townships under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 384) you are advised that by office letter "E" of February 10, 1902, Hon. F. W. Hunt, Governor, has been advised that this office has recommended to the Secretary of the Interior, and there has been inserted in the estimates for the public surveys and resurveys of the public lands for the fiscal year ending June 30, 1903, an additional amount of \$25,000; also that in the event of said additional amount being finally appropriated by this office will take pleasure in consider-

ing the Governor's pending applications for additional surveys under the act of August 18, 1894, supra.

Very respectfully,

BINGER HERMANN,

Commissioner.

DEPARTMENT OF THE INTERIOR

General Land Office.

23464-1902. Washington, D. C., February 10, 1902.

Subject:

Application by the Governor for public surveys in Idaho.

Hon. F. W. Hunt, Governor,

Executive Office,

Boise, Idaho.

Sir:

I am in receipt, through Hon H. Heitfeldt, U. S. Senate, of your letter of January 25, 1902, relative to your application under date of July 5, 1901, for the survey of designated townships in Idaho, under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 394); also calling attention to your letter of August 16, 1901, submitting report as to the status of the lands previously applied for by the State, as requested per office letter "E" of July 19, 1901.

In reply I have the honor to inform you that your letter of August 16, 1901, as also subsequent applications for survey, were duly received, and the delay in acting thereon was due to inability to definitely de-

termine the status of the apportionment made to Idaho of the annual appropriation for surveys and resurveys of the public lands for the ensuing fiscal year.

To the end of enabling this office to increase the apportionment to Idaho of the annual appropriation for public surveys for the fiscal year 1902-1903, so as to provide for the cost of survey under said act of August 18, 1894 *supra*, I have recommended to the Department, and there has been inserted in the estimates for the surveys and resurveys of public lands for the fiscal year 1902-1903 an additional amount of \$25,000.

In the event of said additional amount being appropriated I will take pleasure in considering your application now pending for additional surveys.

Very respectfully,

BINGER HERMANN,

Commissioner.

NOTICE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE.

Notice is hereby given that the State of Idaho on the 30th day of July, 1909, filed in this office a list of lands No. 02601 selected by its State Board of Land Commissioners for Indemnity School purposes under Section No. 4, Act of July 3d, 1890, as follows:

Part of Section	Section	Township	Range
All	20	43	4 E.

Copies thereof by descriptive sub-divisions have

been posted in this office for inspection by any person interested, and the public generally.

Section 11, Regulations April 25, 1907.

“During the period of publication, or any time thereafter, and before final approval and certification the local officers may receive protest or contest as to any of the tracts applied for, and transmit the same to the General Land Office.”

Where lands sought to be selected are alleged by way of protest to be mineral or where applications for patent therefor are presented under the mining laws, or are otherwise adversely claimed, proceedings in such cases will be in the nature of a contest, and will be governed by the rules of practice in force in contest cases.”

Published in
Idaho Press,
Wallace, Idaho.

W. H. BATTING,
Register.

DEPARTMENT OF THE INTERIOR
General Land Office.

Washington, July 16, 1914.

State of Idaho,
Heirs of Charles E.
Everson, and Martin
Groundwater, Guar. of
John C. Groundwater,
v.
Northern Pacific Ry.
Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Holding State indemnity school land selections for cancellation and suspending action as to conflict between railway and homestead claims.

Sirs:

On July 23, 1901, there was filed in your office Northern Pacific Railway Company's list No. 71, under the act of March 2, 1899 (30 Stat., 993), covering * * * (here follows description of a quantity of lands in Township 43 N., Range 4 E. B. M., including all of Section 20) then unsurveyed. The plat of the survey of said township was filed in your office, June 4, 1909, and on the same date, the company filed its re-arranged list No. 71, re-describing its selections to conform to the survey, as required by said act of March 2, 1899, the tracts being then described as * * * (here follows re-descriptive descriptions, including "Section 20"). This list was held by you until August 31, 1909, when you rejected it for the reason that the same was in conflict with selections made by the State of Idaho. Notice of said rejection was not given to the company until September 20, 1909, and, on October 5, 1909, the company appealed from said rejection, urging that you were without authority to take any action thereon other than to report the same to this office for the reason that said list was merely filed to redescribe the original selections according to the survey.

Complaint having been made by the resident attorneys for the company that you had allowed selections by the State covering nearly all of the tracts selected by it as above described, by letter "F", dated December 15, 1909, you were advised that your action in approving the school selections in the face of

the selections of record was contrary to the regulations and practice of the Department and you were instructed to thereafter approve no application to make selection or entry of any lands for which an existing selection or entry remained intact on your records. By letter "F", dated December 18, 1909, your decision rejecting the company's re-arranged list was set aside and vacated, this office holding that you had no authority to reject the same, and that when such a list is filed in your office, you should note thereon the date of receipt and immediately forward it to this office.

* * * * *

The records of this office show the following selections and homestead applications in conflict with the company's selections first herein described:

State Indemnity School list 02604, covering all of Sec. 20, filed July 30, 1909, and approved August 19, 1909, * * * (And other selections and applications.)

The records of this office show that all vacant, unappropriated public lands in the township here in question were temporarily withdrawn by letter "E" dated March 21, 1905, for the proposed Shoshone National Forest, but that they were restored by the Secretary, June 19, 1907, and again became subject to settlement September 30, 1907, and to entry, October 30, 1907.

The township here involved is also noted on the tract book as withdrawn under the act of August 18, 1894 (28 Stat., 394), by letter "E" dated January

20, 1905, said withdrawal being based upon the Governor's application, dated July 5, 1901.

It is shown that the selections of the State now under consideration, have assigned as bases therefor, parts of sections 16 and 36 in townships within the Henry's Lake Forest Reserve, established May 23, 1905, now Targhee National Forest by President's Proclamation, effective July 1, 1908.

By letter, dated February 18, 1910, the resident attorneys for the railway company filed a brief in support of the selections of the company, in which they discussed the claims of the respective parties under the following propositions:

"1. By the action of the Idaho Legislature in March, 1909, the representatives of the State were absolutely prohibited from making selections as indemnity for Sections 16 and 36 on the ground that such sections had been included within forest reserves; and that the attempt in this case to make selections as indemnity for bases of that character was wholly unauthorized and void.

"2. Irrespective of the action of the Legislature above referred to, the attempt made by the State Board of Land Commissioners and its representatives to select the lands in controversy as indemnity for alleged losses of sections 16 and 36 included in forest reserves was, under the constitution and laws of Idaho as construed by the Supreme Court in the case of *Balderston v. Brady*, wholly unauthorized and void.

"3. There was a complete failure of compliance

on the part of the State with the essential requirements of the act of August 18, 1894, in the particulars which will be set forth in the course of the argument of this proposition; and in consequence thereof the act of 1894 never became operative upon the land here involved, and no rights accrued under said act. This point involves a number of subordinate propositions which will be considered in the course of the argument thereof.

“4. Unless the State is entitled to the land by virtue of a superior preference right obtained under the act of 1894, and a subsequent valid selection of the lands in dispute, then the Railway Company’s selections are unquestionably valid, and it is entitled to patent for the land.”

By letter, dated March 24, 1910, the Assistant Attorney General of the State of Idaho filed a brief in reply to that of the Railway Company, on April 29, 1910, the attorneys for the Company filed a brief in answer thereto, and, on May 20, 1910, the Assistant Attorney General for the State filed an answer to the second brief of the Railway Company.

With respect to the contention of the company that the State failed to comply with the requirements of said act of August 18, 1894, it may here be stated that the records of this office show that the application of the Governor of Idaho, under consideration, which was dated July 5, 1901, was filed in the office of the Surveyor General of Idaho, July 8, 1901, and by him forwarded to this office, by letter, dated July 10, 1901. The application on file here shows that it

was received, July 15, 1901. The proof of publication required by said act was filed in this office with the Governor's letter, dated August 18, 1904, and consists of a certified copy of an affidavit showing that publication was made in the Idaho State Tribune of Wallace, Idaho, commencing with the publication of July 10, 1901, and continuing to and including August 14, 1901.

By letter "E", dated January 19, 1901, addressed to the Surveyor General of Idaho, receipt was acknowledged of his letter dated July 10, 1901, inclosing the Governor's application, dated July 5, 1901. Directions were given to secure a statement, showing the total area of lands selected by the State, the approximate area of all the townships theretofore applied for by the Governor and also to report whether or not the total area of lands to which the State was entitled has been or might not be selected from the lands embraced in the townships already withdrawn. It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal for the reason that, in the opinion of the office, the areas embraced in the townships already withdrawn were sufficient to enable the State officers to make its requisite selections in full and that the public interests would not be subserved by further withdrawals of lands from settlement.

By letter "E", dated January 20, 1905, after referring to the Governor's application of July 5, 1901, and the lands included in his said application,

the local officers were instructed to withdraw from adverse appropriation by settlement or otherwise (except under rights that might be found to exist of prior inception) all the lands embraced in certain designated townships including that here in question for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plat of survey in the proper local land office.

A similar claim of the State to that here under consideration was the subject of departmental decision, dated April 29, 1913, (42 L. D. 118) on review, June 14, 1913 (42 L. D. 124), on appeal by the State of Idaho from the decisions of this office, dated August 23 and December 20, 1910, rejecting its school indemnity application, 02851, for certain tracts in T. 42, N. R. 4 E. for conflict with the selection of the Northern Pacific Railway Company list 33, under the act of March 2, 1899 *supra*. Said departmental decision, among other things, held that the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office, and was not a bar to the reservation of the lands for forestry purposes, citing heirs of Irwin vs. State of Idaho, et al. 38 L. D. 219, and the opinion of the Attorney General, dated January 30, 1911, 39 L. D. 482.

This same application of the Governor of Idaho of July 5, 1901, under the said act of August 18, 1894, was involved in the case of Thorpe et al. v. State of Idaho, (35 L. D. 640) in which the Depart-

ment, in its decision, dated June 27, 1907, held (syllabus) that

“The filing on behalf of the State of an application for the survey of lands under the act of August 18, 1894, and the publication of notice thereof as provided by the act, operate as a withdrawal thereof, and all settlements made subsequently are subject to the preference right of the State.

“Notice to the local officers of the withdrawal of lands embraced in an application for survey by the State, as provided by the act of August 18, 1894, is intended primarily for their information, in order that proper notation may be made upon the records and is not essential to the protection of the rights of the state.”

Substantially the same holding was made in *Williams vs. State of Idaho* (36 L. D., 20) on July 17, 1907. Motions for review of these decisions were denied June 4, 1908 (36 L. D. 479;481).

Upon the request of the State an order was issued suspending action upon said departmental decision of June 27, 1907, *supra*, pending a proposed adjustment of the claims of certain settlers, and the case again came before the Department March 22, 1913, upon the answer to the rule issued March 2, 1911, by the Secretary of the Interior inviting the State to show cause why certain school indemnity selections should not be rejected for invalidity of the bases assigned in support thereof. It was held by the department in its decision, dated March 22, 1913, (42 L. D. 15), syllabus:

“Whatever doubt and uncertainty existed concerning departmental decisions in *Thorpe, et al. v. State of Idaho* (35 L. D. 640; 36 L. D. 436), and *Williams vs. State of Idaho* (36 L. D. 20, 481), respecting the right of the State of Idaho to select indemnity in lieu of school sections within the Coeur d’Alene Indian reservation, because of the decision of the Supreme Court of that State in *Balderston vs. Brady et al*, 107 Pac. Rep. 493) holding that school sections within Indian and other reservations were not valid bases for indemnity, having been removed by enactments of the State Legislature of February 8 and March 4, 1911 (Laws of Idaho, 1911, pp. 16, 85) and the later decisions of the Supreme Court of the State in *Rogers v. Hawley et al.* (115 Pac. Rep. 687, 692) said departmental decisions are relieved from suspension and will be carried into effect.”

The case of *Thorpe et al. vs. State of Idaho* again came before the Department, March 10, 1914, on appeal by the State from the Commissioner’s decision, dated May 19, 1913, rejecting the State’s school indemnity selections of certain lands in T. 44, N., R. 2 E., upon the ground that while, at the time the State’s application was filed, the selection of lands by the State in lieu of school sections within Indian reservations was unquestionably permitted by the act of February 28, 1891 (26 Stat. 796), the status of such base lands was changed by the act of Congress, approved June 21, 1906 (34 Stat. 335), providing for the opening to entry and disposition of the Coeur d’Alene Indian reservation lands, as secs. 16 and 36 thereof were granted by that act to the

State of Idaho for the support of public schools.

The Department, in its said decision of March 10, 1914, again reviewed the proceedings had under said act of August 18, 1894, and the departmental decisions above cited, and held that the record showed that the action of the Commissioner in failing to note the withdrawal on his record was not due to inadvertence but to his deliberate judgment that the application for withdrawal should be denied; that, on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants; that no appeal having been filed from the action of the Commissioner, his decision became final; that the decisions of the Supreme Court of Idaho in *Balderston vs. Brady* (107 Pacific 493) and *Rogers vs. Hawley* (115 Pac. 687) determine, beyond question, that the State selections had no validity until their ratification and confirmation by the act of February 8, 1911, supra; that this act had no retroactive effect and in nowise impaired the rights of *bona fide* settlers upon these lands whose claims had attached long before.

Even if it be assumed that a withdrawal existed for the benefit of the State, in this case, under the act of August 18, 1894, supra, from the date of the filing of the Governor's application in this office, July 15, 1901, until the expiration of the period of sixty days after the filing of the township plat, during which time the State might exercise the

preference right of selection accorded to it by said act, yet, it must be held under the authority of the departmental ruling of March 10, 1914, in said case of Thorpe et al. vs. the State of Idaho, that the State Board of Land Commissioners were without authority to relinquish Secs. 16 and 36 in forest and other reservations prior to the passage of the act of the Legislature of February 8, 1911; that consequently, the selections here in question were not, on July 30, 1909, when presented, supported by valid bases, and that the State failed to properly exercise the preference right of selection accorded to it under said act.

The State school selections here in question, not being supported by valid bases when presented, on July 30, 1909, are accordingly hereby held for cancellation, subject to the usual right of appeal, and without prejudice to the right of the State to waive the right of appeal and file new selections for the tracts here in question not in conflict with the claims of the railway company and homestead claimants, designating valid bases therefor.

The question of the validity of the railway company's selection of unsurveyed lands, under the provisions of the acts of July 1, 1898 (30 Stat. 597-620) and said act of March 2, 1899, of the same character as the selection here in question, is before the Department for consideration in the case of Hanson, et al. vs. Northern Pacific Ry. and John Landers, et al. vs. said Company. Action upon the conflicting claims of the Railway Company and the

homestead settlers above mentioned will therefore, be suspended until the Department rules upon the question presented in the cases above referred to.

Notify the proper officers of the State of the action here taken and the representatives of the homestead claimants, and, in due time, report, observing circular of March 1, 1900, (29 L. D. 649). The resident attorneys for the Railway Company will be notified hereof by this office.

Very respectfully,

(Signature illegible)

Commissioner.

Exhibit 2-B, introduced by plaintiff consists in part of the following:

Department of the Interior,
General Land Office.

Oct. 1, 1915.

WHEREAS, by the Act of Congress approved July 2, 1864 (13 Stat., 365), entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and Joint Resolution of May 31, 1870 (16 Stat., 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate

sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

WHEREAS, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon declared forfeited by the Act of September 29, 1890 (26 Stat., 496), have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat., 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the land within Mount Rainier National Park and Pacific Forest Reserve theretofore granted to said company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual Government survey thereof, lying within any State into or through which the railroad of said Company runs; and it is provided that patent shall issue to said Company for lands so selected; and

WHEREAS, the said lands lying within the

said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

WHEREAS, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company, under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as base therefor; the Mount Rainier National Park and former Pacific Forest Reserve, are within the primary limits of the company's grant and lie opposite the constructed line of its road, and are also within the limits of the reserve to the United States as aforesaid, to-wit:

(Here follows description of a number of tracts of land, aggregating 47.75 acres, including all of Section 20, Township 43, Range 4, 640 acres.)

RAILROAD GRANTS AND RIGHT OF WAY DIVISION

August 9, 1915.

It is hereby certified that the foregoing list has been examined in connection with the plats of record in this office, and that the tracts

therein described are vacant and unappropriated public lands and subject to approval and patent to the now Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat. 993); that on September 19, 1912, the Department held that, under the adjustment of the company's claim, it is entitled to select 448,222 acres under the said act of March 2, 1899, and is relieved from the requirement of designating a tract for tract base therefor; that there has been heretofore patented to the company, under this adjustment, 378,947.95 acres, of which 2,462.37 acres have been recovered to the United States, leaving 376,485.58 acres of the base satisfied.

It is further certified that the tracts included in this list that are included in the act of February 26, 1895 (28 Stat., 683), and the supplemental act of June 25, 1910 (36 Stat., 379), were classified and approved as non-mineral; that all these tracts were classified as non-mineral as shown by the field notes of the General Land Office thereof, and have been reported on by the Geological Survey as containing no valuable deposits of coal or other minerals, and as having no valuable power site or reservoir possibilities.

Approved:

(Signed) WALTER S. BINLEY,
 (Signed) F. R. DUDLEY Examiner.
 Chief of Division.

ACCOUNTS DIVISION

September 24, 1915.

Expense of survey and office work on land described in the foregoing list:

Railroad selections, 4,700.75 acres

Field work	\$215.21
Office work at 1c per acre	47.01
Total	\$262.22

Act of June 25, 1910
not involved.

(Signed) FREDERIC NEWHUGH,
Chief of Division.

Now, Therefore, as it has been found that the foregoing selected lands, being a part of the 448,222 acres to which the Northern Pacific Railway Company is entitled under the act of March 2, 1899, on account of its relinquishment accepted and approved July 26, 1899, of the lands lying within the primary limits of its grant and also within the Mt. Rainier National Park and Pacific Forest Reserve, are, so far as the returns to the General Land Office show, free from adverse claims and appear to be of the character contemplated by the said act of March 2, 1899, and to be subject to patent thereunder, and no objection appearing of record in this office, it is hereby recommended that the said selected tracts containing four thousand, seven hundred acres and seventy-five hundredths of an acre, be approved and patented to the said Northern Pacific Railway Company, the patent to contain a reservation in accordance with the proviso to the act of August 30, 1890 (26 Stat., 391).

(Signed) C. M. BRUCE,
Acting Commissioner.

To the Honorable
Secretary of the Interior.

Pat. No. 532360

June 6, 1916.

Department of the Interior,
Washington, D. C.
Oct. 4, 1915.

Approved: covering four thousand, seven hundred acres and seventy-five hundredths of an acre.

(Signed) ANDRIEUS A. JONES,

First Assistant Secretary of the Interior.

“B” List 425.

Exhibit “2-C” introduced by plaintiff, consists in part of the following:

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY
List No. 71.

State of Idaho.

U. S. Land Office at Coeur d’Alene.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Rainier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled “An Act to set aside a portion of certain lands in the State of Washington, now known as

the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Coeur d'Alene land district, in the State of Idaho.

LIST OF LANDS North of base line and East of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park", in lieu of lands set opposite thereto, relinquished under said Act of March 2, 1899.

PART OF SECTION	AREA				REMARKS
	Sec.	Town	Range	Acres	
		N	E	100ths	
* * *	* * *	* * *	* * *	* * *	* * *
8	20	43	4	640	
* * *	* * *	* * *	* * *	* * *	* * *

The following tracts which when surveyed will be described as follows:

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

AREA

PART OF SECTION	Sec.	Town	Range	Acres	100ths	REMARKS
* * * * *	*	*	*	*	*	*
8 All	21	17	8	640		
* * * * *	*	*	*	*	*	*

The following tracts which when surveyed will be described as follows:

State of Minnesota,
County of Ramsey,—ss.

I, Wm. H. Phipps, being duly sworn, depose and say: That I am the Land Commissioner of the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company; that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and all of them, are vacant unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

Subscribed and sworn to before me this 8th day of July, 1901.

W. F. VON DEYN,
Notary Public, Ramsey County, Minnesota.
(Notarial Seal.)

U. S. Land Office at Coeur d'Alene, Idaho,
Sep. 25, 1901.

We hereby certify that we have carefully

examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled, "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of fifty-eight dollars in full payment and discharge of said fees.

(Signed) D. H. BUDLONG, Register.

(Signed) C. D. WAMER, Receiver.

(The foregoing list No. 71 is endorsed as follows:)

Filed July 23, 1901.

(Signed) D. H. BUDLONG,
Register.

Approved Sept. 25, 1901.

June 4, 1909.

Serial No. 02484.

71-14

Act of March 2nd, 1899,

Describing Anew the Lands Selected in
Coeur d'Alene List No. 71 (In Part),
So as to Conform With the United States Survey
Thereof.

Filed June 4, 1909. Approved190...

Land Department

Northern Pacific Railway Co.

List No. 71 (In Part)

Of Selections of Public Lands Made by the
Northern Pacific Railway Company

As Inuring to It Under Grants of July 2, 1864, and
May 31, 1870, in the

Coeur d'Alene U. S. Land District, Idaho.

Coeur d'Alene List No. 71 (In Part.)

WHEREAS, by authority granted by an act of Congress entitled, "An act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, did on the twenty-third day of July, A. D. 1901, select in the United States District Land Office at Coeur d'Alene certain lands in township 43 North, range 4 east, Boise Meridian, as described in its selection list numbered 71, which said lands at the date of said selection were unsurveyed public lands; and

WHEREAS, by section four (4) of the act of congress hereinbefore referred to, it is provided that in case the lands selected thereunder be unsurveyed at the date of said selection, the company selecting the same shall within a period of three months after the lands so selected

have been surveyed and plats thereof filed by said local land office, file a new list describing the lands selected according to the Government survey.

NOW THEREFORE, in conformity with this provision and for the purpose of so describing said lands selected that they will conform to the government descriptions thereof according to said survey, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, does hereby describe anew the lands included in said selection list as follows, to-wit:

LIST OF LANDS North of base line and East of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899."

PART OF SECTION.	AREA			Range.	Acres.	100th.	REMARKS
	Sec.	Town. N	E				
* * * * *	*	*	*	*	*	*	*
8 All	20	43	4	640			
* * * * *	*	*	*	*	*	*	*

The records of the Survey indicate that there are no valuable deposits of coal or other minerals within the area specified, and that the lands have no valuable power-site or reservoir possibilities.

H. C. RIZER (Signed)
Acting Director.

31-1

May 18, 1915 JFE

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

June 28, 1915.

Promulgating departmental decision, canceling state selections, etc.

State of Idaho,
Heirs of Charles E. Everson
and Martin Groundwater, Guar.
of John G. Groundwater,
v.

Northern Pacific Ry. Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

In reference to the above entitled case, involving lands in T. 43, N., R. 4 E., B. M., Idaho, you are advised that the decision of the Secretary of the Interior, dated January 19, 1915, has become final. A copy of said decision is herewith inclosed for your information and for your files.

Said decision affirmed, upon the authority of the case of Thorpe et al. v. State of Idaho (43 L. D., 168), and the case of McDonald v. Northern Pacific Railway Company, decided October

30, 1914 (unreported), the decision of this office, dated July 16, 1914, holding the State school indemnity selections, hereinafter more particularly described, for cancellation, subject to the usual right of appeal, and without prejudice to the right of the State to waive the right of appeal and file new selections for the tracts here in question not in conflict with the claims of the railway company and homestead claimants, designating valid bases therefor. It was also held that action upon the conflicting claims of the railway company and the homestead settlers therein mentioned would be suspended until the Department had ruled upon the questions therein presented.

The school indemnity selection lists involved are as follows:

State list 02700, covering all of Sec. 6, except lots 1 & 2;

State list 02705, covering all of Sec. 7;

State list 02708, covering the $W\frac{1}{2}$ and $SE\frac{1}{4}$, Sec. 17, $W\frac{1}{2}NW\frac{1}{4}$, Sec. 29, and $N\frac{1}{2}SE\frac{1}{4}$, Sec. 33;

State list 02706, covering all Sec. 18;

State list 02704, covering all Sec. 19;

State list 02604, covering all Sec. 20; and

State list 02699, covering the $NE\frac{1}{4}$ and $S\frac{1}{2}$ Sec. 30, and $NW\frac{1}{4}$ Sec. 31.

In accordance with the terms of said departmental decision and said office decision of July 16, 1914, the State selections described are hereby canceled and you are directed to make proper notation thereof on your records. The conflicting claims of the railway company and of the heirs of Charles E. Everson and Martin Groundwater, as the Guardian of John G. Groundwater, will be separately considered, the questions involved and referred to in said decision

of July 16, 1914, having now been decided by the Department.

Notify the proper officers of the State and the representatives of the homestead claimants of the action herein taken. The resident attorneys for the railway company will be notified hereof of by this office.

Very respectfully,
(Signed.) CLAY TALLMAN,
Commissioner.

Plaintiff's Exhibit "2-D" is in part as follows:

DEPARTMENT OF THE INTERIOR,
United States Land Office.
Coeur d'Alene, Idaho, Aug. 31' 1909.
Belden M. Delaney, Esq.,
Clarkia, Idaho.

Dear Sir:—

You are hereby notified that your homestead application serial No. 02539, filed June 10, 1909, for the NE $\frac{1}{4}$, Sec. 20, T. 43, N., R. 4, E. B. M. is hereby rejected for the reason that the same is all in conflict with the selection by the State of Idaho.

30 days are allowed in which to appeal to the Commissioner of the General Land Office.

Yours truly,
W. H. BATTING,
Register.

DEPARTMENT OF THE INTERIOR,
General Land Office.
Washington, December 16, 1909.

In re rejected homestead application.

Mr. B. M. Delaney,
Saint Maries, Idaho.

Sir:

I am in receipt of your letter of November 15, 1909, in the nature of an appeal from the action of the local officers at Coeur d'Alene rejecting your application filed June 10, 1909, to make homestead entry for the N. E. $\frac{1}{4}$ of Sec. 20, T. 43, N. R. 4, E. B. M., because of conflict with school indemnity selection of the State of Idaho. It is gathered from your letter that for about six years you have worked in that region of country which embraces the particular township wherein said NE $\frac{1}{4}$ of Sec. 20 lies, and that you have placed some improvements on the particular tract in question.

It appears, however, that said T. 43, N. R. 4 E. with a number of others was withdrawn from settlement or other appropriation adverse to the state, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:

“And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.”

Unless therefore, it could be shown that you were

a settler on said NE $\frac{1}{4}$ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's rights to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

FRED DENNETT,

Commissioner.

Serial No. 02539.

DEPARTMENT OF THE INTERIOR,
United States Land Office.

At Coeur d'Alene, Idaho.

The annexed papers were filed the day and hour noted thereon.

Rejected Nov. 27, 1912, because homestead application was rejected for conflict with State selection. No appeal taken. No proof of publ.

W. H. BATTING,

Register.

WILLIAM ASHLEY,

Receiver.

Notice, etc.

Feb. 25, 1913, Proof finally rejected.

S-41

In reply please refer to "F" Coeur d'Alene 02539

WJI

1xB&G

1xS&H

WJI DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

July 9, 1915.

Address only the
Commissioner of the General
Land Office.

B. M. Delaney

vs.

Northern Pacific Ry. Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Sir:

Homestead Application Held for Rejection.

June 10, 1909, B. M. Delaney filed his homestead application for the NE $\frac{1}{4}$ of Sec. 20, T. 43 N., R. 4 E., Idaho, alleging settlement thereon, June 21, 1903, which application was rejected by you for conflict with state selection for indemnity school purposes and with selection of the Northern Pacific Railway Company, list 71.

Letter of November 15, 1909 in the nature of an appeal from your action in rejecting said application was transmitted to this office.

The plat of survey of said T. 43 N., R. 4 E., was approved, November 24, 1908 and filed in the local office, June 4, 1909.

The State of Idaho filed indemnity school selection, list 02604, August 19, 1909, including said NE $\frac{1}{4}$, claiming a preference right under the act of August 18, 1894 (28 Stat., 394), which list was canceled June 28, 1915.

July 23, 1901, the Northern Pacific Railway Company selected said NE $\frac{1}{4}$ with other lands per list 71, under the act of March 2, 1899 (30 Stat., 993). June 4, 1909, the Railway Company filed a re-arranged list describing the tracts according to the government survey, as required by said act of March 2, 1899.

Inasmuch as the land was duly selected by the

Railway Company prior to the date of the alleged settlement and date of filing the application and conformed to the survey within the time allowed, it was not subject to entry at the time the application was filed, Frank O. Daniel vs. Northern Pacific Railway Company (43 L. D., 381.)

Your action in rejecting said application is hereby sustained, subject to the usual right of appeal.

The resident attorneys for the Company and applicant will be notified direct by this office.

Very respectfully,

C. M. BRUCE (Signed)

Assistant Commissioner.

D-31156

DEPARTMENT OF THE INTERIOR,

Washington, November 18, 1915.

Belden M. Delaney

vs.

Northern Pacific
Railway Company.

“F”

Coeur d’Alene 02539

Homestead application held
for cancellation.

Affirmed.

Decision promulgated

Nov. 22, 1915.

APPEAL FROM THE GENERAL LAND OFFICE

By its decision of July 9, 1915, the General Land Office hold for cancellation the homestead application of Belden M. Delaney, Coeur d’Alene 02539, for the N. E. 1/4 Sec. 20, T. 43, N. R. 4 E., for the reason that his settlement, upon which his application to

enter was based, was not made until after the Northern Pacific Railway Company had filed its selection list No. 71, Coeur d'Alene 02484, for the same land, under the Act of March 2, 1899 (30 Stat. 1095).

In his appeal Delaney urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative for the reason that an application had been made by the State of Idaho, prior to the date on which the list was filed, for the survey of the township in which the land is located, under the act of August 18, 1894 (28 Stat. 394) and was pending at the time the list was filed, and therefore, prevented the acceptance and filing of the list.

This contention is contrary to the holding of this Department in the closely kindred case of Swanson v. Northern Pacific Railway Company (37 L. D. 74).

The decision in that case is in harmony with the established practice of the land department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations. (Stewart v. Peterson, 28 L. D. 515, 519).

But aside from this consideration, the rejection of the application in this case is supported by the reasons given by this Department in its decision in the cases of Thorpe et al. v. Northern Pacific Railway Company (43 L. D. 167) F. O. Daniels v. The Northern Pacific Railway Company (43 L. D. 381), and George A. McDonald v. The Northern Pacific Railway Company (D-15548) involving Lewiston 02620,

decided October 30, 1914 (unreported) wherein the issues and facts presented were very similar to those presented in this case.

The decision appealed from is affirmed and the case remanded with directions that Delany's application to enter be finally rejected.

(Signed.) ANDRIEUS A. JONES,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
Washington.

January 29, 1916.

D-31156

Belden M. Delany

vs.

Northern Pacific Railway Co.

"F"

Coeur d'Alene, 02539
Motion for rehearing.
Denied.

MOTION FOR REHEARING IN RE DEPARTMENTAL
DECISION OF NOVEMBER
18, 1915.

Motion for rehearing has been filed on behalf of the above plaintiff of departmental decision of November 18, 1915, wherein the Department affirmed the action of the Commissioner rejecting his homestead application for conflict with a selection by the Northern Pacific Railway Company for the same lands, under the act of March 2, 1899. (30 Stat., 1095).

The questions raised in the motion for rehearing

DEPARTMENT OF THE INTERIOR,
Washington.

March 11, 1916.

D-31156

Belden M. Delany

vs.

Northern Pacific Railway Co.

“F”

Coeur d’Alene 02513

Petition Denied.

PETITION TO THE SUPERVISORY POWER.

Belden M. Delany filed petition for exercise of supervisory power of the Secretary of the Interior to vacate and recall departmental decision of November 18, 1915, and that of January 29, 1916, denying his motion for rehearing in the case between him and the Northern Pacific Railway Company, involving his settlement claim to NE. $\frac{1}{4}$, Sec. 20, T. 43 N., R. 4 E., B. M., Coeur d’Alene, Idaho, on the ground of the railway company’s prior right as selector.

The ground of the petition is that the selection of the land in terms of a future survey made in the company’s prior selection is illegal and void under the clear and unmistakable language in the decision in *Daniels v. Northern Pacific Ry. Co.* (43 L. D., 381). There is also a contention that the Northern Pacific Railroad Company had been foreclosed and had gone out of existence before this selection was made and before the act of March 2, 1899 (30 Stat., 993), wherefore it is claimed the act was ineffective for want of an existing grantee.

Counsel misinterprets the decision in 43 L. D., 381, referred to. The Department held that:

Not only have descriptions of unsurveyed land in terms of a future survey been recognized in departmental practice, but, as has been stated, such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land. Indeed, in the instructions of May 9, 1899 (28 L. D., 521), under the act of June 4, 1897, *supra*, was incorporated a provision broad enough to cover all selections of unsurveyed land under any act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable.

The act of March 2, 1899, authorized the railroad company to make selections of unsurveyed public lands. Section 4 requires that in case the tract selected should at the time of the selection be unsurveyed the list filed by the company in the local land office should describe the tract "in such manner as to designate the same with a reasonable degree of certainty," and requires a new list to be filed redescribing the land after the survey has been made. The description employed in this particular selection, under the decision in *Daniels v. Northern Pacific Railway Company*, *supra*, complied with the statute as it was made with a reasonable degree of certainty. The petitioner's contention as to this feature of the case is accordingly not well founded.

The second point of contention, if conceded, would

work ruin over the entire northwest in all the states through which the Northern Pacific Railway Company passes. It would nullify the acts of March 2, 1899, and July 1, 1898 (30 Stat., 620), for both acts name the Northern Pacific Railroad Company as authorized thereby to make selections. It is true the railroad company had ceased to be an active corporation by foreclosure of all its rights and franchises and sale to its bondholders who reorganized under the name of the Northern Pacific Railway Company, and that company, as successor to the railroad company, has been recognized in the opinion of the Attorney General, February 6, 1897 (21 Op., 486), and March 18, 1905, referred to in departmental decision (33 L. D., 636). It has also been recognized in numerous departmental decisions, among which are *Furgeson v. Northern Pacific Ry. Co.* (33 L. D., 634, 636); *Jones v. Northern Pacific Ry. Co.* (34 L. D., 105, 106); *Northern Pacific Ry. Co. vs. Santa Fe Pacific R. R. Co.* (36 L. D., 368, 369); *Vold v. Northern Pacific Ry. Co.* (30 L. D., 378); *Duba v. Northern Pacific Ry. Co.* (42 L. D., 464-5).

The Department will not now hold that the act of March 2, 1899, *supra*, was void because no such corporation as the Northern Pacific Railroad Company was then a going concern.

The petition is denied.

(Signed.)

ANDRIEUS A. JONES,
First Assistant Secretary.

The papers constituting a part of Plaintiff's Ex-

hibit 2-D above copied, and other papers which are a part of that exhibit and which it is not deemed necessary to include in this abstract, sufficiently show that the official plat of the survey of the township in which the land in controversy was situated, was filed in the local land office at Coeur d'Alene, Idaho, on June 4, 1909; that on June 10, 1909, Belden M. Delany made application to enter the land in controversy as a homestead, alleging that he made settlement on said land June 21, 1903; that said application was rejected by the Register and Receiver of said Coeur d'Alene land office; that on August 31, 1909, the said Register addressed to said Delany the notice of rejection bearing that date which is copied above; that Delany thereafter appealed to the Commissioner of the General Land Office; that said Commissioner, acting on this appeal and by the decision of July 9, 1915, which is copied above, affirmed the action of the Register and Receiver and rejected Delany's application; that thereafter Delany appealed to the Secretary of the Interior from said decision of the Commissioner of the General Land Office, and by decision of November 18, 1915, copied above, the Secretary affirmed the decision of the Commissioner appealed from; that Delany thereupon moved the Secretary of the Interior for a rehearing, and by the decision of January 29, 1916, copied above such motion was denied by the Secretary; and that thereafter Delany petitioned the Secretary of the Interior for the exercise of his supervisory power, and such peti-

tion was denied by the Secretary's decision of March 11, 1916, copied above.

Defendant's Exhibit No. "1" is as follows:

Patent No. 108.

Northern Pacific Railway Lands.

Act March 2, 1899.

Coeur d'Alene and Lewiston Land Districts, Idaho.

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, greeting:

WHEREAS, by the act of Congress approved July 2, 1864, (13 Stat., 365), entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and the Joint Resolution of May 31, 1870 (16 Stat., 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

WHEREAS, official statements from the Secretary

of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890 (26 Stat., 496), have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat., 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the land within Mount Rainier National Park and Pacific Forest Reserve, theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual Government survey thereof, lying within any State into or through which the railroad of said Company runs; and it is provided that patent shall issue to said Company for lands so selected; and

WHEREAS, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior, and

WHEREAS, There has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the

lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the Act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as base therefor, the Mount Rainier National Park and former Pacific Forest Reserve, are within the primary limits of the Company's grant, and lie opposite the constructed line of its road, and are also within the limits of the reserve to the United States, as aforesaid, to-wit:

Boise Meridian—Idaho.

Township forty-three north of Range four east. *** Section twenty. *** (And other lands.)

Containing in the aggregate four thousand one hundred forty-two and sixty-seven-hundredths acres:

NOW KNOW YE, That the United States of America, in consideration of the premises, and pursuant to said Acts of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing; TO HAVE AND TO HOLD the said tracts, with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water

rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

This patent is issued in lieu of patent No. 493369, dated October 11, 1915, which has been canceled because of an error in the description.

IN TESTIMONY WHEREOF, I, Woodrow Wilson President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

(SEAL.) Given under my hand, at the City of Washington, the Sixth day of June in the year of our Lord one thousand nine hundred and Sixteen and of the Independence of the United States the one hundred and Fortieth.

By the President: Woodrow Wilson

By M. P. LeRoy, Secretary.

L. I. C. LAMAR,

Recorder of the General Land Office.

Record of Patents,

Patent Number 532360.

Defendant's Exhibit No. "2" is as follows:

DEPARTMENT OF THE INTERIOR

General Land Office,

Washington, D. C., January 20, 1905.

Subject:

Notice of withdrawal of lands under Governor's application for survey under Act of August 18, 1894.

Register and Receiver,

Coeur d'Alene, Idaho.

Sirs:

With the letter of the Governor of Idaho, dated August 18, 1904, was received at this office a copy of "Notice for survey of lands," dated Boise, Idaho, July 6, 1901, as applied for by F. W. Hunt, Governor, under act of August 18, 1894, the townships being designated as follows:

Townships 40, 41 and 42 north, Range 5 east;
" . . . 41 and 42 north; Range 4 east;
" . . . 43 north, ranges 2, 3 and 4 east;
" . . . 44 north, ranges 2, 3, 4 and 5 east;

Of said designated townships 41 north, range 4 east; 43 north, ranges 2 and 3 east, and 44 north, range 2 east were withdrawn from further disposal by settlement or otherwise per office letter "E" of March 29, 1899, to the proper district land officers. Except as stated the townships designated in the Governor's application of July 6, 1901, were not heretofore withdrawn. Township 45 north, range 5 east, and embraced in contract No. 250, was withdrawn March 29, 1899.

Under date of December 20, 1904, the State of Idaho made special deposit of \$20,000, under the act of August 18, 1894, to cover the cost of surveys embraced in applications for survey as made by the Governor; and the surveys were embraced in contracts Nos. 249 and 250, awarded Messrs. G. R. and W. A. B. Campbell and Charles L. Campbell, D. S., respectively; liabilities payable from the stated deposits; contracts approved January 18, 1905.

You are hereby instructed to give public notice, by posting in your office and as a matter of information to newspapers published in the vicinity, that the lands embraced in townships 41, 42, 43 and 44 north, range 6 east; 41 north, range 5 east; 42 north, range 5 east; and 43 and

44 north, range 4 east, are reserved from any adverse appropriation by settlement or otherwise (except under rights that may be found to exist of prior inception) from and after the date of the approval of said contracts Nos. 249 and 250, namely, January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of the survey of the designated townships in your office or the proper local land office, during which period the State authorities may select any of the lands situate in said townships which are not embraced in any adverse claim.

A letter similar to this has been addressed to the district land officers at Lewiston the lands being situate in the two districts.

Note on your records the suspension of such of the designated townships as are situate within your district, and acknowledge receipt hereof.

You will observe from the foregoing statements that under the Governor's application of March 15, 1899, the following designated townships (and partially embraced in the two awarded contracts), were withdrawn from disposal by settlement or otherwise March 29, 1899, by letter "E" to the respective district land officers, viz:

Townships 41 north, ranges 3 and 4 east; 42 and 43 north, ranges 2 and 3 east; 44 north, ranges 1 and 2 east; and 45 north, ranges 3, 4, and 5 east.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Defendant's Exhibit No. "3" is as follows:

DEPARTMENT OF THE INTERIOR

Washington.

October 30, 1914.

D-15548

George A. McDonald,

v.

Northern Pacific Railway
Company, and State of
Idaho.

Decision Promulgated

Nov. 13, 1914.

“F”

Lewiston 02620.

State selection and home-
stead application rejected.

Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

On July 11, 1901, the Northern Pacific Railway Company applied to select under the act of March 2, 1899, (30 Stat. 993), the S $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 30, and N $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 31, T. 42, N., R. 4 E., Lewiston, Idaho, land district. Prior to the filing of this application, to-wit, July 6, 1901, the State of Idaho, through its Governor, applied to have the lands in this township surveyed, and also on the same date filed an application for the withdrawal of these lands from all forms of settlement and entry, under the act of August 18, 1894 (28 Stat. 394).

Upon consideration of this application, the Commissioner of the General Land Office refused to make said withdrawal upon the ground that sufficient land had already been withdrawn to satisfy the State's claim. Subsequently, and on January 20, 1905, the Commissioner considered the application filed by the State, and

withdrew the land for the state. The township plat was filed in the local office July 1, 1909, and the Railway Company's selection was adjusted to these lines of survey. On the date the township plat was filed, George A. McDonald filed application to make homestead entry of said tract, and on August 27, 1909, the State filed its selection.

The land was temporarily withdrawn for forestry purposes March 31, 1905, and was included in a forest withdrawal in 1906. On the foregoing statement of facts, the Commissioner in his decision of December 20, 1910, rejected the State's application upon authority of the decision of his office rendered December 20, 1909, in the case of the State of Idaho v. Northern Pacific Railway Company, wherein he held that the act of the legislature of the State of Idaho prohibited the use of Sections 16 and 36 as bases for lieu selections. Said decision also held the application of McDonald for rejection because of conflict with the prior selection of the Northern Pacific Railway Company. From this action the State has appealed.

Until January 20, 1905, the lands under consideration, occupied the status of those involved in the case of Thorpe et al. v. State of Idaho (43 L. D. 168), wherein the Department upheld the authority of the Commissioner to refuse to make the withdrawal for the State. It follows, therefore, that the withdrawal on behalf of the State did not take effect until January 20, 1905. as the doctrine of relation cannot be applied where the Commissioner advisedly refused to make the withdrawal at the time application thereof was filed. Prior to January 20, 1905, the railway company had made selection of these lands, and its right is superior to that of the State. For the reasons hereinbefore stated, the

judgment of the Commissioner is hereby affirmed.

(Signed.)

A. A. JONES,
First Assistant Secretary.

Counsel having stipulated that the foregoing abstract of the evidence contains all the matter necessary and material for the consideration of any question raised on the appeal herein, and such stipulation being deemed to be correct, it is therefore ordered that the said transcript be and it is hereby settled and allowed as the statement of the evidence.

Dated at Boise, Idaho, this 14th day of November, 1918.

FRANK S. DEITRICH,
Judge.

Endorsed, Filed Nov. 14, 1918.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)
No. 660.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for all of the parties hereto, that the foregoing abstract of evidence contains all of the evidence heard on the trial of the above entitled cause which is material for the consideration of any questions raised on the appeal of said cause, and the same may be settled and certified by the Court as an abstract of so much of the evidence that is necessary for the proper consideration of all the questions raised on

the appeal of said cause.

A. H. KENYON,
S. M. STOCKSLAGER,
Counsel for Plaintiff in Error.

STILES W. BURR AND
HORACE H. GLENN,
SKUSE & MORRILL,
Counsel for Defendant, Edward Rutledge Timber
Company.

CHAS. W. BUNN,
CANNON & FERRIS,
Counsel for Defendant, Northern Pacific Railway
Company.

Endorsed, Filed Nov. 14, 1918.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 660.

DECISION

July 1, 1918.

A. H. Kenyon and S. M. Stockslager, Attorneys for
Plaintiff.

Stiles W. Burr, Skuse & Morrill, Attorneys for Ed-
ward Rutledge Timber Company, Defendant.

Cannon & Ferris, Attorneys for defendant North-
ern Pacific Railway Co.

DIETRICH, DISTRICT JUDGE:

The issues are greatly reduced by the decision in
West v. Edward Rutledge Timber Company, (244

U. S. 90, 221 Fed. 30, 210 Fed. 189), a case arising in the same locality and out of the same general conditions. The relief sought is of the same character in both cases, and the facts are so similar that they need not be stated in full. The land in controversy is the Northeast Quarter of Section 20, Township 43 North, Range 4 East of Boise Meridian. It was patented to the Northern Pacific Railway Company in 1916, and by it conveyed to its co-defendant, the Edward Rutledge Timber Company. Plaintiff contends that in law her ancestor, Beldon M. Delaney, was entitled to patent by virtue of his homestead settlement, and that the defendants hold the title in trust for her. Prior to 1909 the land was unsurveyed. Delaney, having purchased the improvements erected by a preceding occupant, made settlement in 1903, and in 1909, when the land was surveyed, he made application to enter, and later, on November 20, 1912, submitted his final proof. Both the application and the tender of final proof were rejected by the land office.

1. Delaney's acts of settlement and residence are far from satisfactory, and I have great hesitancy in holding them sufficient. True, the showing is not radically different from that in the West case, but in that case the amount cleared and cultivated was thought to be "pathetically small," and, however broad our sympathy for the settler, a line must be drawn somewhere. I am not at all sure that the land officials would have found the showing sufficient had they considered the final proof, but

inasmuch as their rejection was upon other grounds, I shall, in the further consideration of the case, assume that the residence and improvements met the requirements, under the liberal policy prevailing in the Land Department, and that the final proofs would have been accepted but for other conditions upon which the land officials acted.

2. The description in the railroad company's selection list was in terms of future survey, as in the West case, and while the distance to the surveyed lands is a little greater, the difference is not such as to warrant a holding that as a matter of law the description was insufficient to designate the land "with a reasonable degree of certainty." Within reasonable limits, it is a question of fact in any case whether such a description is sufficiently certain, and a finding thereon by the Land Department within such limits will not be disturbed by the courts.

3. The remaining point, argued with great earnestness by both sides, was in no wise involved in the West case, and requires a brief statement of fact. The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the provisions of the Act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether

the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a railroad company subject to the state's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.

Under the act of 1894 it is provided that (a) the application for survey must be made by the governor of the state to the "Commissioner of the General Land Office," (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed "shall be reserved, upon the filing of the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of

sixty days from the date of filing the township plat" in the proper district Land Office.

On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, including Township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. No appeal having been taken by the State from his ruling,

the same became final and binding, provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records, of the reservation or withdrawal of the land. Such was the status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State, but only from January 18, 1905, not from July 15th, 1901, as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43-4, "from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which time the state authorities may select any of the lands situated in said township, which are not embraced in any adverse claim."

Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such juris-

diction. *N. P. R. R. Co. v. Idaho*, 39 L. D. 583. *Thorpe v. Idaho*, 43 L. D. 168. *State vs. Roberson*, 44 L. D. 448.

(Also the decision herein involved.)

The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a state with an unsatisfied grant of a thousand acres could by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the state. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only "with a view to satisfying the public land grants * * * to the extent of the full quantity of land called for" by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the state? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the state

has the right to select. Such being the extent of the right or privilege conferred upon the state, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged, as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407. *McMichael v. Murphy*, 197 U. S. 304. *Hodges v. Colcord*, 193 U. S. 192. *Sturr v. Beck*, 133 U. S. 541. *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Commissioner of the General Land Office had the power to reject it, the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land. But

here at the very outset there was a declination to recognize the application. If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. The land was not entered or selected; the State made no specific claim, and it might ultimately decide not to select a single subdivision. True, the terms "reserved" and "withdrawn" are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. By the filing of the application the State initiated no claim or right to any portion of the land. As has been very properly held by the Land Department, I think, the position of the State is closely analagous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515. *Cronan v. West*, 34 L. D. 301. *State v. N. P. R. R. Co.*, 37 L. D. 70. *Swanson v. N. P. R. R. Co.*, 37 L. D. 74. *Delaney v. N. P. R. R. Co.*, (unreport-

ed, decision Nov. 18, 1915). No good reason is apparent for holding such a practice illegal. Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the railroad company to select, wherein it is authorized "to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its application, and after the railroad company filed its selection. The right of the railroad company to select is quite as broad as the right of the citizen to "homestead". As already suggested, by its application for survey the state initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term "reserved" is used, plainly there is no reservation in the ordinary sense, as for some governmental purpose. The moment the preferential period in favor of the state expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

In view of these considerations, it is thought that

the Land Department acted upon a proper construction of the law and accordingly the plaintiff's bill will have to be dismissed, and such will be the order.

Endorsed, Filed July 1, 1918,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

DECREE.

The above entitled cause having come on to be heard, the complainant appearing by her solicitor, A. H. Kenyon, and defendants appearing by their solicitors, Stiles W. Burr, John J. Skuse, Fred B. Morrill and Edward J. Cannon, and having been submitted to the court upon the pleadings herein, and upon proof taken in open court, and said cause having been argued by counsel, and the court being advised, it is on motion of counsel for defendants,

ORDERED, ADJUDGED AND DECREED,

That bill of complaint of the complainant herein, be, and it is hereby dismissed for want of equity, and; it is further,

ORDERED, ADJUDGED AND DECREED,

That defendants have and recover their costs and disbursements herein.

Dated this 20th day of September, 1918.

BY THE COURT,

FRANK. S. DIETRICH,

Judge.

O. K. as to form.

A. H. Kenyon,

Solicitor for plaintiff.

Endorsed, Filed Sept. 20, 1918,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

PETITION FOR APPEAL AND ORDER
ALLOWING SAME.

The above named plaintiff, Alra G. Farrell, conceiving herself aggrieved by the judgment entered on the 20th day of September, 1918, in the above entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and she prays that this, her appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

A. H. KENYON,

S. M. STOCKSLAGER,

Attorneys for Plaintiff.

Old National Bank Bldg.,

Spokane, Washington.

And now, to-wit, on the 14th day of November, 1918, IT IS ORDERED, that the appeal be allowed as prayed for and that the amount of bond on said

appeal be, and it hereby is, fixed at Two Hundred Dollars.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

ASSIGNMENTS OF ERRORS.

Comes now the above named plaintiff, Alra G. Farrell, and in connection with her appeal makes the following assignments of error which she avers were committed by the Court in the trial of this cause, and upon which she will rely in the prosecution of her appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Ninth Circuit:

I.

The Court erred in finding and deciding that the description in the Railroad Company's lieu selection list in terms of future survey were sufficient to designate the lands with a "reasonable degree of certainty", as required by the act of March 2nd, 1899, when applied to the facts established on the trial of this cause, and in applying the rule in the West case to the case at bar: (Andrew West, vs. N. P. Ry. Co. et al)

And also in finding and deciding that under the facts shown the question of whether or not the land

was described with a "reasonable degree of certainty", was a question of fact only.

II.

The Court erred in finding, holding and deciding that the State of Idaho did not initiate any claim or right to the lands in controversy by the filing of its application for survey under the Act of August 18th, 1894; and in holding and deciding that the Railway Company could make a valid selection of the lands in controversy while the application of the State of Idaho to select was still pending, which right of the Railway Company was "subject to the right of the State to select."

III.

The Court erred in finding, holding and deciding that Beldon M. Delany, the deceased entryman, as the successful contestant did not have a preference right of entry of the lands in controversy under the homestead laws of the United States as against the defendant Railway Company, by reason of being the successful contestant over the State of Idaho, in the contest for same before the Land Office; and in holding and deciding that such preference right of entry on the part of Delany did not operate to prevent the filing of the Railway Company's selection list so as to prevent the Railway Company from acquiring a right to select subject to such preference right on the part of Delany.

IV.

The Court erred in rendering judgment in favor of the defendants, and against the plaintiff.

WHEREFORE, plaintiff prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore rendered in favor of the defendants and render judgment in favor of the plaintiff, to the effect that the defendants hold the title to the real estate described in plaintiff's complaint herein in trust for the plaintiff, and that plaintiff's title thereto be forever quieted as against the said defendants and each of them, or, if it be deemed that such relief is not grantable, that the cause be remanded for new trial.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

PRAECIPE

An appeal having been prosecuted by the plaintiff above named from the final decree entered herein, dismissing the bill of complaint of the plaintiff.

IT IS NOW STIPULATED, by and between the parties hereto by their respective solicitors, that the following papers shall, together with the petition for appeal, order allowing appeal, bond on appeal, citation on appeal, be incorporated into and constitute the record on such appeal:

1. Copy of amended Bill of Complaint.
2. Copy of Answer of defendant, Northern Pacific Railway Company to amended bill of complaint.
3. Copy of Answer of defendant, Edward Rutledge Timber Company, to amended bill of complaint.
4. The abstract of the evidence.
5. A copy of final decree.
6. A copy of the opinion of the trial court.

It is further stipulated that such transcript, including the foregoing papers, may be approved by the Judge of said Court for the purposes of the appeal herein.

A. H. KENYON,
S. M. STOCKSLAGER,
Counsel for Plaintiff.

STILES W. BURR and
HORACE H. GLENN,
SKUSE & MORRILL,
Counsel for Defendant,
Northern Pacific Rail-
way Co.

CHAS. W. BUNN,
CANNON & FERRIS,
Counsel for Defendant,
Edward Rutledge Tim-
ber Co.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

CITATION ON APPEAL

UNITED STATES OF AMERICA,—ss.

To Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within Thirty (30) days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Idaho, wherein, Alra G. Farrell (substituted for Beldon M. Delany), is the appellant and Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation, are appellees, to show cause, if any there be, why the said decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS, the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, this 23rd day of November, 1918, and of the Independence of the United States the One Hundred and Forty-second.

(SEAL)

FRANK S. DIETRICH,
District Judge.

ATTEST:

W. D. McReynolds, Clerk.

Service of the foregoing Citation on Appeal acknowledged and copy thereof received this 29th day of November, 1918.

STILES W. BURR &
HORACE H. GLENN,
Counsel for Defendant,
Edward Rutledge Timber
Company.

CANNON & FERRIS,
CHARLES DONNELLY,
Counsel for Defendant,
Northern Pacific Rail-
way Company.

RETURN TO RECORD

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

ATTEST:

(SEAL)

W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 154, inclusive, to be full, true and

correct copies of the pleadings and proceedings in the above entitled matter, and that the same together constitute the transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe for such transcript.

I further certify that the cost of the record herein amounts to the sum of \$216.95, and that the same has been paid by the appellant.

I further certify that I have received from the appellant the sum of \$200.00 cash bond on appeal; which amount is deposited in the registry fund of this Court pending the termination of this appeal.

Witness my hand and the seal of said Court this 21st day of December, 1918.

(SEAL)

W. D. McREYNOLDS,
Clerk.